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## **Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective**

Ioannis Lianos, Frédéric Jenny, Florian Wagner von  
Papp, Evgenia Motchenkova, Eric David

**Centre for Law, Economics and Society  
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May 2014

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## **Abstract**

*The study proceeds to a comparative analysis of the judicial scrutiny of financial penalties for competition law infringements in the following jurisdictions: European Union, United States, Germany, United Kingdom, France and Chile.*

**Keywords:** fines, financial penalties, judicial review, judicial scrutiny, proportionality

**JEL Classification:** K21, L40, L49

**CENTRE FOR LAW, ECONOMICS & SOCIETY**

**UCL FACULTY OF LAWS**

# **Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective**



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## A. General discussion on the role of judicial scrutiny and discretion<sup>1</sup>

Mainstream law and economics perceives judicial review as having primarily an error-correction function<sup>2</sup>. Judicial review may also play additional roles, such as to guarantee procedural fairness through the protection of the rights of the parties, to ensure accountability with the promotion of deliberative and administrative processes or to ensure consistency, from a legal perspective, in the action of the reviewed authority, or finally to protect substantive fundamental rights, such as private property or the freedom of commerce<sup>3</sup>. At the same time, judicial review may impose costs on the regulators, the undertakings and the wider economy and may affect the effectiveness of the action of competition authorities. An intensive judicial scrutiny of the action of the authorities may discourage competition authorities from taking action, when this may be judged controversial, because of the fear of being overturned by the courts. Hence, the effectiveness of competition law enforcement may be negatively affected, in particular general deterrence. Furthermore, the principle of the separation of powers may lead courts to impose some self-restraint on the intensity of their scrutiny of competition authorities' decisions in some circumstances.

When the implementation of competition policy is entrusted to an independent administrative authority (administrative enforcement system), such as an integrated competition law agency exercising the functions of case selection, investigation, examination and adoption of the final decision, the courts exercise a merely "supervisory" jurisdiction, as they are concerned by the legality of the authority's action, rather than its opportunity and merits. Even when the implementation of competition policy is entrusted to competition authorities and courts exercising a trial jurisdiction, the authorities bringing cases at first instance in front of specialised tribunals (a prosecutorial system), it is possible to argue that courts holding appellate jurisdiction (e.g. Supreme Courts) should exercise some self-restraint, in view of the fact that the law has been implemented directly by a specialised court. It is expected that a generalist court should recognize the limits of its own expertise and defer, in certain matters, to the view of the specialised tribunal (in a prosecutorial system), or that of a competition authority (in the presence of an administrative enforcement system). In view of their specialised expertise, specialised tribunals and competition authorities may be treated alike, with regard to their relation to a generalist court

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<sup>1</sup> We do not include a separate bibliography for this report. For bibliographical references, please consult the bibliography included in the report Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova E., David, E. *et al* (2014) *An Optimal and Just Financial Penalties System for Infringements of Competition Law: a Comparative Analysis* (CLES Research paper series 3/2014, UCL Faculty of Laws: London).

<sup>2</sup> See Shavell, S. (1995) "The Appeals Process as a Means of Error Correction" *Journal of Legal Studies* 24, 379.

<sup>3</sup> Andreangeli, A. (2012) "Competition law and human rights: striking a balance between business freedom and regulatory intervention" in Lianos, I. and Sokol, D. (eds) *The Global Limits of Competition Law*, Stanford University Press, 22-36.



exercising an appellate function. In addition, in the context of an administrative enforcement system, one may advance the argument that policymaking should not be delegated in the hands of politically unaccountable judges but remain in the hands of politically accountable agencies. The legal framework needs, therefore, to strike a careful balance between the need to ensure accountability and accuracy of the interventions of competition authorities, without inadvertently holding back their action and transforming the courts into competition authorities.

It follows from the above that competition authorities (and by analogy specialised tribunals) should be given some form of discretion. Even if the reviewing court has superior competence on issues of law, there should still be some discretion given to the specialised court having trial jurisdiction and/or the competition authority with regard to questions of facts and policy. The term *discretion* defines the function of the agency and describes the role of the reviewing court. Charles Koch accounts for five different uses of the term discretion in administrative law:

“The authority to make individualizing decisions in the application of general rules can be characterized as “individualizing discretion”. Freedom to fill in gaps in delegated authority in order to execute assigned administrative functions may be called “executing discretion”. The power to take action to further societal goals is “policymaking discretion”. If no review is permitted, the agency is exercising “unbridled discretion”. Finally, if the decision cannot by its very nature be reviewed, the agency is exercising “numinous discretion”<sup>4</sup>.

These different degrees of discretion hint at different functions and forms of judicial review.

The judicial scrutiny of competition law decisions may take various forms. One may distinguish according to the different standards of review, that is, the grounds on which the regulator’s decisions may be challenged before a judge.

**Judicial review** focuses on the lawfulness of the action of the reviewed authority, based on specific grounds. They do not entail a rehearing of the case. There have traditionally been three grounds for judicial review<sup>5</sup>, which may overlap and eventually merge with each other<sup>6</sup>:

- **Illegality**: when the administrative authority acted ultra vires in a manner which is inconsistent with the parameters imposed by a superior source of

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<sup>4</sup> Koch, C.H. (1986) “Judicial Review of Administrative Discretion” *George Washington Law Review*, 54 (4), 469-511, 470.

<sup>5</sup> These principles were elaborated upon by Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, 410.

<sup>6</sup> See, Lord Irvine LC in *Boddington v British Transport Police* [1999] 2 AC 143 at 152 E-F: “the various grounds for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result”. Yet, there is no need to prove irrationality in

law, the decision was taken for improper purposes, when the authority impermissibly expands its discretion or takes into account unlawful considerations in its decision,

- **Irrationality/unreasonableness** in the exercise of any discretion (a concept which can be interpreted in different ways)<sup>7</sup>, and
- **Procedural impropriety**: when, for instance, the authority has not followed the right procedures, such as the requirement to give reasons, the right to be heard and the rule against biased decision-making.
- The courts also accept that a **breach of legitimate expectations** constitutes a discrete ground for judicial review, when an individual has been given an expectation that the authority in charge has not fulfilled.

These categories are not exhaustive nor mutually exclusive. Although the process of judicial review and its emphasis on the legality of the authority's action indicates that the court will not engage thoroughly with questions of fact and policy but will instead focus on issues of law, the boundaries between these three categories are often difficult to establish, with the result that their relation can be better explained as forming a *continuum*. This is the reason why a manifest error in the assessment of facts may constitute a ground for review, without the court being expected to conduct a full factual assessment.

In contrast, a **review on the merits** (or often referred to as an **appeal process**) will examine all possible grounds of review, including a full factual assessment of the rationality and opportunity of the authority's action. It involves a consideration of whether the decision of the authority was right. The court will attempt to go beyond the usual grounds of review in order to determine what the decision of the authority should have been, in view of its statutory duties. A decision may thus be found legal,

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<sup>7</sup> English courts tend to consider that an irrational or unreasonable decision must be "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it": *Council of Civil Service Unions -v- Minister for the Civil Service* [1985] AC 374. The CAT elaborated on the concept of irrationality in *BAA v Competition Commission (No. 2)* [2012] CAT 3 20(3) - 20(4), 20(08) (asking the Competition Authority to take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it as well as to have a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. To the extent to which it is necessary to carry out investigations to achieve this objective, the CAT requires evaluative assessments to be made by the OFT, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it. Finally, the CAT intervenes only if no reasonable competition authority could have been satisfied on the basis of the inquiries made. The CAT should examine the "whole" context of the decision and should not aim to "trawl through the long and detailed reports of the [Competition Authority] with a fine-tooth comb to identify arguable errors").

following judicial review, if it was made according to the law, and it is not unreasonable or made with procedural impropriety, but nonetheless may be found wrong, after the careful examination of facts in the process of a review on the merits. However, courts will not engage with questions of policy, in view of the “executing” and “policymaking” discretion from which benefit competition authorities and the principle of separation of powers. Executing discretion refers to the “freedom to fill in gaps in delegated authority in order to execute assigned administrative functions”, while “policy making discretion consists in “the power to take action to further societal goals”<sup>8</sup>.

The intensity of review into the rationality of the authority’s action may also be variable. In the context of judicial review courts may engage in a limited intensity review by exploring if the authorities have gravely disregarded the limits of their discretion, also paying attention not to substitute their decision for that of the authorities (**low intensity**). Courts may also exercise a more intensive level of scrutiny of the rationality of the decision of the authority, again without substituting their decision for that of the authority. Yet, they may show particular self-restraint to engage with some of the most complex and expertise-demanding factual assessments of the authority, providing authorities some margin of appraisal in complex economic and technical issues (**intermediary intensity**). In such cases the competence to set the fine is not transferred from the authority to the court but remains with the authority, which is limited however in the options available to it, as it is not possible to choose the option declared illegal by the court. Courts may finally exercise a comprehensive review of the facts, which may lead them to substitute their own judgment for that of the authority (in the context of a **review on the merits** or “**unlimited judicial review**”), and/or provide to the authority a very limited margin of discretion with regard to the options available to it (**high intensity judicial review**). The differences between a “review on the merits” and “unlimited judicial review” are subtle but relate mostly to the allocation of the residual competence recognized in the area under examination. In the context of a review on the merits, the residual competence is transferred from the authority to the court, which may choose to reconsider the question *de novo* and substitute its judgment and discretion for that of the authority. In the context of an “unlimited judicial review”, there is no transfer of competence from the authority to the court. The authority keeps residual competence in the matter, even if the court may choose to substitute its judgment for that of the authority. The Court can only substitute its judgment to that of the authority *only* for the issues covered by the specific ground of review that has been found successful.

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<sup>8</sup> Koch, C.H, (1986) “Judicial Review of Administrative Discretion” *George Washington Law Review*, 54 (4), 469-511, 470.

One may also refer to the possibility of further appeals from the courts exercising a limited or unlimited judicial review function to a superior court (e.g. Supreme Court). Two options are generally open. Either the appeal (or “*pourvoi en cassation*”) will be on points of law only (for instance on grounds of lack of competence of the appellate court, a breach of procedure before it avertingly affecting the interests of the applicant, or the infringement of law), the superior court not being able to substitute its own assessment for that of the inferior reviewing or appellate court, or it will exceptionally cover errors of fact as well (appeal in revision or “*pourvoi en revision*”). Superior courts nevertheless traditionally have taken a limited view on their role in such “appeals”, and it is rare that judgments of inferior courts are overturned for errors of fact in the very exceptional circumstances an appeal in revision has been granted.

Consequently, in all circumstances, courts may exercise some self-restraint in order to provide the authority and the trial courts with the necessary degree of “executing” and “policymaking discretion”, in accordance with the principle of the separation of powers. Courts are not expected to become competition authorities. One may also advance a similar argument for self-restraint with regard to the relation between specialised tribunals exercising a trial jurisdiction and courts exercising some form of appellate jurisdiction, this time on the basis of the superior expertise of the specialised tribunal and the often limited role of the superior courts in reviewing the judgments of inferior courts (on points of law only and exceptionally for errors of fact).

There are various standards of review on which the regulator’s decisions may be challenged before a judge, depending on the intensity of the judicial review and the object of judicial scrutiny (control of legality or review on the merits). Judicial scrutiny is often exercised on material error. Not all errors committed will result in overturning the decision. These may be of different sorts<sup>9</sup>:

- **Material error of law:** the decision-maker proceeded to a wrong interpretation of the law or ignored a legal principle, or misapplied the legal framework to the facts in question (a wrong characterization of facts coming from a misinterpretation of existing legal categories).
- **Material error of fact:** the decision-maker misinterpreted the facts in reaching a decision, that error being significant enough to have an impact on the ultimate decision so that it might have been different, if such error has not been committed.

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<sup>9</sup> The following presentation draws on HM Government (2013) “Streamlining Regulatory and Competition Appeals. Consultation on Options for Reform” (June 19, 2013), 29-30.

- **Material procedural irregularity:** the procedure by which the decision was reached was biased, or the process was unfair to the level that the decision-maker was not equipped with the material it would reasonably have obtained, had the proper procedures being followed. The procedural irregularity should be significant enough to have an impact on the ultimate decision so that it might have been different, if such error has not been committed.
- **Unreasonable exercise of discretion:** the authority (or the trial court) has exercised its discretion in a way falling outside the band in which a reasonable decision-maker would act. This may relate to the assessment and weighing of evidence, performed contrary to common sense or established principles of logic.
- **Unreasonable evaluative judgments or predictions:** “ ‘Judgment’ refers to circumstances where the regulator is engaged in an evaluative function, considering various factors, assessing the balance of advantages and disadvantages and then deciding what outcome would most appropriately meet the regulatory objectives”, for instance, including “a situation where a regulator is balancing their objectives or duties”<sup>10</sup>. “ ‘Prediction’ concerns circumstances where a regulator applies economic or other expert analysis to form a view on what will happen in the future, for example the effects of a particular price control on the market”<sup>11</sup>. It is generally accepted that “where a [decision-maker] has made a judgement or prediction, the appeal body should defer to the regulator’s expertise”. Hence, if the decision-maker focused on the relevant factors and followed the right logical procedures, having exercised its judgment in a proper manner, the court exercising an appellate jurisdiction should not overturn its decision. Predictions should be assessed as being reasonable at the time of the decision, and not at the time of the appeal, even if it appears that they were wrong, because of a significant lapse of time between the trial court’s or authority’s decision and the appeal.

In the exercise of their discretion, authorities may dispose of various trade-off devices in setting the appropriate, to the specific circumstances, remedial action or sanctions. The judicial scrutiny exercised by the appellate court will vary, depending on the discretionary space (discretion and/or margin of appreciation) the courts give to the authority (or specialised tribunal). We can systematize the different options in the form of a continuum with three broad types of scrutiny, going from a wide discretionary space given to the authority to a narrower one.

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<sup>10</sup> HM Government (2013) “Streamlining Regulatory and Competition Appeals. Consultation on Options for Reform” (June 19, 2013) 30.

<sup>11</sup> HM Government (2013) “Streamlining Regulatory and Competition Appeals. Consultation on Options for Reform” (June 19, 2013) 30.

One may adopt a simple **means-end rationality test**, which will consider if the amount of penalties imposed would indeed be a rational means to a purported end (effective enforcement of competition law, including deterrence). This may amount to a simple suitability test, which would provide the decision-maker with a lot of discretion in adopting the requisite amount of penalty, but with the limitation that the amount of the penalty should be linked rationally with some limited ends (effective enforcement of competition law, including deterrence). Hence, the test involves a list of limited ends, defined according to the aims pursued by the legal framework in question, as it would make no sense to proceed to an analysis of means without having in mind the ends to which these means aim.

Another possibility would be to assess the **proportionality of the sanctions**. This trade-off device would inquire whether the means (the level of penalty) are proportionate to the ends (effective enforcement of competition law, including deterrence). This exercise will involve in addition to considering if the means chosen are indeed a rational means to a purported end (step 1 of the test), some assessment of the possible excessive costs of the specific penalty in relation to its benefits (step 2), and whether the amount of penalty chosen is the least restrictive to the affected interests' alternative available in order to achieve the purported regulatory ends (step 3). The last operation inquires whether there is a less restrictive (to the affected interests), reasonably available alternative to accomplish the same remedial end (effective enforcement and deterrence). This test will not amount to a cost benefit analysis, as the test does not necessarily require that the benefits be more important than the costs; the costs may be more than the benefits but the decision-maker maintains some margin of appreciation to accept non disproportional differences between costs and benefits in the case.

Finally, we can categorise under the broad category of **cost benefit analysis, which is** a balancing test that attempts to measure the costs and benefits of a remedial option or of alternative remedial options, before choosing the most appropriate test. This trade-off device requires of course a more intensive fact and evidence-gathering exercise by the decision-maker (at first instance or when exercising an appellate jurisdiction), and the consideration of the values of the costs and benefits examined. The type of the trade-off device required depends on the capacity of the institutions in each jurisdiction to carry the necessary assessment. One would expect a different capacity in a competition authority or a specialised expert tribunal than in a generalist court. The control exercised by the appellate jurisdiction may thus be either a rationality test, or a proportionality test, or finally a cost benefit analysis test, the latter test restricting significantly the discretion of the competition authority and raising important issues of comparative institutional analysis with regard to the available expertise in each institution.

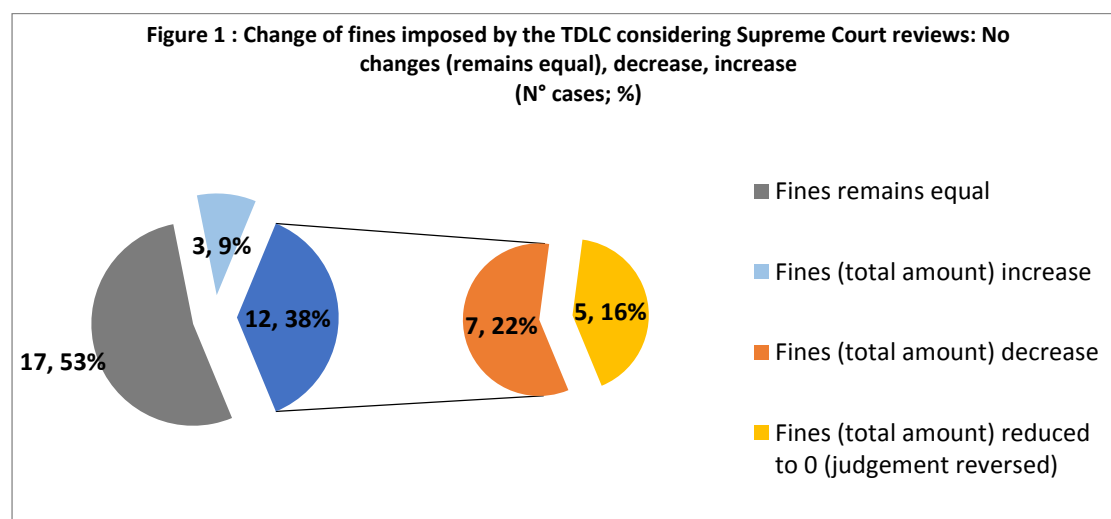
Having in mind these principles, we will examine the practice of judicial scrutiny of fines in Chile, before exploring the balance between effectiveness of competition policy and the protection of rights reached by other key jurisdictions.

## B. Judicial scrutiny of fines in Chile

### 1. General data

The final judgments of the specialised Competition Tribunal (TDLC) can be challenged before the Supreme Court. The remedy is called “recurso de reclamación”, which constitutes a *sui generis* procedure introduced for the implementation of Chilean Competition Law. This procedure allows the Supreme Court to review all legal and factual issues involved and may be compared to an appeal in revision. In some instances, the Supreme Court has proceeded to a full review of the TDLC’s determinations.

Since the establishment of the Competition Tribunal (in 2004), the Supreme Court has ruled 32 times on TDLC’s judgments, on the basis of which fines were imposed<sup>12</sup>. In **16** cases the Supreme Court upheld the TDLC’s decision (fines remained unchanged). In **5** cases the Supreme Court eliminated the fine (primarily in the cases where the anticompetitive conduct was not properly accredited). In **3** cases the Supreme Court has increased the fines imposed by the TDLC (considering the total amount). Finally, the following analysis focuses on the remaining **7** cases, where the Supreme Court reduced the fines imposed by the TDLC.



<sup>12</sup> It is important to emphasise that this does not reflect the total number of cases in which the TDLC has imposed fines.

It is noteworthy that the analysis undertaken by the Supreme Court when reviewing other administrative fines is different than the one undertaken when examining fines imposed in the enforcement of competition law.

For instance, fines imposed by the Electricity and Fuels Commission may be challenged before the generalist Appeal Court of the concerned jurisdiction on issues of law and fact. The judgment may be challenged before the Supreme Court but only regarding some limited issues (*“recurso de casación en la forma y recurso de casación en el fondo”*). The role of the Supreme Court in these cases is limited to the review of material procedural errors or material errors of law. The Supreme Court will approve or disapprove the imposed fine but will not be able to reduce it or increase it (thus substituting its judgment to that of the appellate court).

Similarly, fines imposed by the Securities and Insurance Commission may be challenged before ordinary generalist civil courts and later appealed before the relevant Appeals Courts. They may finally be challenged in front of the Supreme Court, which is limited to the review of material procedural errors or material errors of law (*“recurso de casación en la forma y recurso de casación en el fondo”*). Again, the Supreme Court will proceed to a limited review of these fines.

There are different factors explaining this difference of approach. First, different types of judicial scrutiny apply in each case. In the context of competition law, the Supreme Court exercises an appellate jurisdiction in revision, examining points of law and fact, while in the context of utilities (energy) and securities’ regulation the Supreme Court exercises a limited jurisdiction on points of law only ( *“pourvoi en cassation”*). Second, in the context of competition law the Supreme Court reviews the judgment of a specialised tribunal exercising a trial jurisdiction and benefiting from an extensive expertise on matters of law and economics (and the underlying policy choices), while in the context of utilities (energy) and securities regulation, the Supreme Court reviews the judgments of ordinary generalist appellate courts. Hence, one may argue that the Supreme Court should proceed equally carefully in all these instances and recognize the limits of its own expertise on policy, when reviewing.

It is true that fines imposed in the context of competition law infringements are generally of a higher level than that imposed in the context of utilities (energy) and securities regulation, as this is often the case in other jurisdictions. Although it has been impossible to locate a database with the imposed fines in the context of utilities (energy) and securities regulation, or information about the filed remedies in front of the Civil Courts and the Appeals Courts or the Supreme Court’s judgments, for comparison purposes, we have included some recent cases regarding fines imposed by the Electricity and Fuels Commission and the Securities and Insurance Commission. These fines have generally been confirmed by the Supreme Court.



**Table 11: Judicial Scrutiny of Regulatory Fines in Chile**

<b>Electricity and Fuels Commission (SEC)</b>			
<b>Case/company</b>	<b>Fine imposed by SEC</b>	<b>Appeal Court</b>	<b>Supreme Court</b>
OSRAM. Fine imposed for not providing required information.	UTA 200	Confirmed	Confirmed January 2014
OSRAM. Fine imposed for not certifying electric products.	UTA 140 plus trial expenses	Confirmed	Confirmed January 2014
Many electric companies responsible for a 2010 blackout.	UTA 6,300 in total plus compensation for consumers.	Different companies appealed separately. Some succeeded, others not.	Confirmed all fines originally imposed by the SEC. November 2013
Transelec. Fine imposed for infringing the supply contract	UTA 2,000	Confirmed	Confirmed March 2013
Gas company Lipigas for not certifying a gas installation of a building that caused an accident.	UTA 200	Overtaken (annulled fine)	Confirmed fine May 2012
Many electric companies involved in blackout considered responsible for a 2004 blackout	UTA 6,460	Confirmed	Confirmed August 2011
Many electric companies considered responsible for a 2002 blackout	UTA 13,750 in total	Confirmed	Confirmed March 2011

<b>Securities and Insurance Commission (SVS)</b>			
<b>Case/company</b>	<b>Fine imposed by SEC</b>	<b>Appeal Court</b>	<b>Supreme Court</b>
María Luisa Solari and Marcel Zarour. Fine imposed for the use of privileged information	UF 1,000 and UF 2,725	Confirmed	Confirmed December 2013
CEO's of pension funds administrator for the use of privileged information.	UF 350	Confirmed	Overtured (annulled fine) November 2013
PriceWaterhouseCoopers. For breaching duties of care of an external audit firm.	UF 8,000	Confirmed	Confirmed November 2013
Pablo Alcalde. Fine for modifying the financial statements of a company.	UF 25,000	Confirmed	Confirmed October 2013
Juan Cueto. For use of privileged information.	UF 1,620	Confirmed	Confirmed November 2012
Banchile stockbrokers. For use of "forward contracts".	UF 300	Overtured (annulled fine)	Confirmed fine October 2011

[Information obtained from the press]

Yet the relative low amount of these fines may be explained from the availability of other types of sanctions (criminal) and the deterrent effect of private litigation for damages, which are not available to the same extent in the context of competition law enforcement. Similarly, competition law litigation always produces polycentric effects, in the sense that large categories of consumers or market actors (at the national level) are affected by competition law infringements and the impact on the overall economy may be particularly high. This is rarely the case for the type of infringements found in energy and securities regulation, which explains the need to factor into the setting of fines in the area of competition law considerations of specific and general deterrence. General deterrence may be affected by the existence of a legal maximum threshold for fines in the context of competition law, as it is possible for undertakings to adopt strategies maximizing the benefits of competition law infringements, in view of the limited fines they pay for it as a result of the maximum fines threshold. Last but not least, competition law infringements are not easily observable, in particular if these take the form of secret cartels, with the result that the probability of detection of competition law infringements is on average much lower than that of other types of infringement, for instance in utilities or securities regulation, where firms are subject to intensive regulatory scrutiny and frequent monitoring of their activity and accounts by regulators. Hence, if according to the

formula for optimal enforcement we introduced in the first part of this report, an optimal sanction should depend on the harm inflicted by the infringement and its probability of detection, the low probability of detection of competition law infringements and the significant harm that they inflict on consumers and the economy overall should justify a much higher level of penalties.

## 2. Case Studies

We proceed to the analysis of the most important cases of the Supreme Court examining the fines imposed by the Competition Tribunal. Cases in which Supreme Court has reduced the fines imposed by the TDLC are the following:

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1.	CONSTRUCTORA E INMOBILIARIA INDEPENDENCIA      Abus LTDA. (COMPLAINT) e of Construc vs. AGUAS NUEVO domin tion SUR MAULE S.A. <i>et al.</i> ance	<b>Reduced</b>  <b>(-47%)</b>
	DECISION 85	

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In 2005, a private construction company and the FNE filed complaints against a sanitary services provider (Aguas Nuevo Sur). It was argued by the construction company that the defendant charged arbitrary and discriminatory prices for its services for real estate projects in the rural areas of certain regions of Chile.

The FNE extended the complaint to other three sanitary services providers (ESSAL, ESSBIO and Aguas Andinas). The FNE argued that between 2003 and 2005 the companies made abusive requirements and charges for their sanitary services (clean water and sewer system) for users in urban and rural areas near to the their respective concession areas and that they had misused a reimbursable financing contribution system that was established in order to finance the expansion of the provision of sanitary services, to new real estate projects and developments, in their concession areas.

The FNE<sup>13</sup> required a fine of 65.000 UTM (5,400 UTA) for ESSBIO, 44.000 UTM (3,600 UTA) for Aguas Nuevo Sur, 48.000 UTM (4,000 UTA) for ESSAL and 50.000 UTM (4,100 UTA) for Aguas Andinas. The amounts were established “mainly due to

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<sup>13</sup> <http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20FNE.pdf>

the economic profits obtained” by the companies. The FNE made some general calculations regarding how much additional charges they made to some construction companies, but does not explain how it got to the established number in detail.

In July 2009 the TDLC issued a sentence<sup>14</sup>. For the purposes of determining the amount of the fine, the TDLC considered article 26.c DL No. 211 which states that the seriousness of the conduct, the economic benefit and previous offenses, must be taken into account.

The TDLC found regarding the claim presented by the construction company, that Aguas Nuevo Sur had indeed charged abusive prices in some cases and imposed a fine of 1,338 UTA based on the additional amounts charged.

Regarding the claim presented by the FNE, the TDLC found that Aguas Nuevo Sur and ESSBIO had misused the existing state reimbursable financing contribution system. The TDLC determined that Aguas Nuevo Sur had perceived benefits of at least 44,000 UF (2,130 UTA) and ESSBIO at least 41,000 UF (2,000 UTA). These results were obtained after a detailed review of information provided by Sanitary Services Supervisor Authority.

In addition, the TDLC found that the abusive behaviour was important.

Therefore the TDLC imposed a fine for Aguas Nuevo Sur Maule of 1,254 UTA (in addition to the previous fine) and for ESSBIO SA fine of 2,341 UTA.

The other undertakings were not sanctioned. Nevertheless, for all of them, the TDLC required some changes in the pricing politics and recommended changes in the regulation to the authorities.

The fine was reduced by the Supreme Court among other reasons because the defendants have not been previously convicted for breaches of competition law. Those reasons made the Supreme Court conclude that the fines imposed by the TDLC were disproportionate.

**Paragraph 18:** “[...] This Court agrees with the conclusions of the judgment under appeal and, accordingly, will reject the claim of Aguas Nuevo Sur Maule S.A. and ESSBIO S.A. and will confirm the judgment that considers unwarranted the charging of the item “new consumption” [by the defendants]; however the Court considers that the amount of the fine set forth in the judgment are disproportionate to the conduct which is attributed to the two companies. In particular, the realization of type of letter c ) of Article 3 of Decree 211 [Competition Act] are based on a series of observations about the new consumption factor, that even when founded, do not demonstrate exactly the amounts that would benefit the water companies to the expense of construction. Moreover, as recognized

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<sup>14</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_85\\_2009.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_85_2009.pdf)

by the ruling, Aguas Nuevo Sur Maule S.A. and ESSBIO S.A. have not been previously convicted for breaches of competition law and taking into account the request of both subsidiary undertakings for the purposes of requesting a reduction of fines, this Court will grant the request to the manner determined in the operative part of Decision”.

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	FNE (COMPLAINT) and BANCO DE CHILE vs.				
2.	FALABELLA Y PARIS S.A.	Collusio n	Retail		<b>Reduced (-25%)</b>
	DECISION 63				

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In this case the fine is reduced by 25%, considering (i) the duration of the harmful event (duration of the anticompetitive behaviour); (ii) the economic benefit reported by the acts committed in that period (the context of the anticompetitive conduct was a technology trade fair, which lasted four days, in which LCD TV sets would be offered at special prices).

Indirectly, the Court also considered that the fine requested by the FNE was lower than the fine imposed by the TDLC.

**Paragraph 34:** “[...] Comparative review of the arguments contained in the complaint initiated by the National Economic Prosecutor's Office and the TDLC's judgment evidence a similar analysis on the behaviour of the defendants. However, after weighing in the facts, they differ in the amount of the fines imposed: the amount recommended by the National Economic Prosecutor's Office is evidently lower than the fine imposed on TDLC's judgment”.

**Paragraph 35:** “Moreover, the limited duration of the punishable behaviour[] needs to be taken into consideration. Therefore, one of the factors that need to be borne in mind in determining the amount of the fine to be applied is the duration of the harmful event and its consequences over time. Indeed, the realization of the so-called "Technology IN Trade show of Banco de Chile" took place over four days (6 , 7, 8 and 9 April 2006), a situation which rules out a persistent or continuous violation of competition [law].

Also, the amount of the fine should consider, among other things, the economic benefit accountable to the acts committed in that period. Therefore, it would be logical to consider a reasonable percentage that corresponds to the duration of the facts, unlike the TDLC's judgment that in the final part of its reasoning [paragraph] 163°,

argues that *"the amount of the fine for each participant to the agreement, will be approximately 2% of the 2005 sales of home appliances, in which customers make use of the department stores' own credit card as payment method"*, reasoning that extends the profit reported during those four days to the annual income.

**Paragraph 36:** "For those reasons, this Court accepts the alternative claim -that both defendants have made- and will determine the amount of the fine in the operative part of this sentence".

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3.	FNE (COMPLAINT) vs. AM PATAGONIA S.A et al.	Collusio n	Health	<b>Reduced (-90%)</b>
DECISION 74.				

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On 2006, the FNE presented a claim alleging collusion of 74 of the 84 physicians that worked in Punta Arenas (southern and isolated city of Chile). They had subscribed an agreement regarding the prices to be charged for services given by the different physicians and formed an association. The agreement had the effect of increasing the prices of the health services in Punta Arenas. The claim was presented on December 2006<sup>15</sup>, and the FNE requested a fine of 100 UTA to the three physicians that were the instigators and 50 UTA for the rest of them. On September 2008<sup>16</sup> the TDLC issued a sentence absolving 10 physicians that did not (or could not due to the market conditions) raise the services prices; condemning the rest of them to a fine of 15 UTM (which is only 1,25 UTA) and the instigator, to 30 UTM (2,5 UTA). The fines were considerably lower than the ones required by the FNE. The TDLC reduced the fine because the undertakings took actions to reduce the effect of the illegal conduct once aware of it and the formed association had also many licit purposes. In a judgment, issued in December 2008<sup>17</sup>, the Supreme Court reduced the fine by 90%, considering (i) the duration of the anticompetitive behaviour (May 2005 to May 2006) and (ii) the acts followed by the defendants in order to mitigate the anticompetitive effects of their agreement.

The Supreme Court considered that the TDLC's sentence did not contained sufficient reasoning to support their fining decision and that the fines had been applied without mentioning adequate motives, grounds and circumstances. Therefore, the TDLC would have failed to comply with the final paragraph of Article 26 Competition Act. The Court insisted that the development of such reasoning was necessary to achieve a fair trial.

<sup>15</sup> [http://www.tdlc.cl/DocumentosMultiples/Requerimiento\\_C\\_121\\_06.pdf](http://www.tdlc.cl/DocumentosMultiples/Requerimiento_C_121_06.pdf)

<sup>16</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_74\\_2008.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_74_2008.pdf)

<sup>17</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_74\\_Corte\\_Suprema.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_74_Corte_Suprema.pdf)

For these reasons the Supreme Court condemned each undertaking to the fine of 1,5 UTM (something like US 1,200).

**Paragraph 12:** “[...] Finally, this Court will grant the defendants’ request, to substantially reduce the fine. To do this, this Court considers that first, the TDLC’s judgment does not contain sufficient reasoning to support their decision; so the application of fines has been built almost as a matter of discretion, without adequate motifs, grounds and circumstances for the parameters used for setting the amount of the fine, all of which impose a failure to comply with the final paragraph of Article 26 Competition Act.

As this Court has held in previous decisions (Decision RoI No. 2339-08), the development of such reasoning is necessary to achieve a fair trial, understood both on its formal or adjective dimension as well as on its substantive or substantial extension, especially considering this is directly linked to the principle of reason and proportionality, to allow the parties to seek a proper and clear defense and offer adequate judicial remedies.

**Paragraph 13:** “Also in this case the restricted temporal scope of the acts must be considered. Therefore, one of the factors that have to be borne in mind in determining the amount of the fine to be applied is the duration of the harmful event and its consequences over time, as held by this Court in judgment No. 2339-08. Indeed, the TDLC itself established the period of the infringement from May 2005 to May 2006 [...], a situation that ruled out a persistent or continuous process in violation of free competition. Moreover, the decision highlights that, once appropriate measures are adopted by the defendants, Ampatagonia and the ways they operate does not pose a risk to free competition”.

**Paragraph 14:** “[...], finally, special consideration must be given to the acts displayed by the defendants in order to mitigate the anticompetitive effects of the agreements, which also has been expressly recognized in the sentence by the Competition Tribunal in paragraph thirty-sixth”.

**Paragraph 15:** “[...], for the reasons given, the Court, accepting the request of the defendant, will determine the fine in the amount that will be established in the operative part of the Decision”.

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	FNE'S COMPLAINT			
	vs. LA ASOCIACION			
4.	GREMIAL DE BUSES	Collusio	Transp	
	INTERBUS <i>et al.</i>	n	ort	
	DECISION 82			<b>Reduced (-50%)</b>

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In this case the fine was reduced by 50%, considering (i) the number of parties sued, (ii) the size of the market in which they operate, and (iii) the section of the bus routes involved in the collusion agreement.

**Paragraph 11:** “[...] On the aggravating circumstances considered for the calculation of the fine, according to the forty-second paragraph of the TDLC’s judgment, we conclude that to date, Article 26 of the Competition Act does not apply, because as is asserted in the sixth paragraph of the same judgment, that provision defined as aggravating circumstances for the former criminal responsibility on violations of competition law, the fact that it was a trade association who breached the law. On this basis, as well as considering the number of member of the trade association, the size of the market in which they operate, the section of the route which ultimately generated the illicit agreement, allows the Court to reduce the amount of the fine imposed on the defendant. This does not [] in any way diminish the reproach against the conduct [] which justifies its sanction.

For these reasons and for the provisions of Article 27 of the Competition Act, the Claim raised in the main of pages 492 against the judgment N ° 82/2009 [...] is welcomed only in what considers the decrease of the amount of the fine imposed on “Interbus Trade Association” to thirty (30) UTA<sup>18</sup> [...]”.

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	FNE'S COMPLAINT vs. Abuse	Electri	
5.	EMPRESA	of	
	ELECTRICA	DE domina	<b>Reduced (-25%)</b>

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<sup>18</sup> Unidad Tributaria Mensual (UTM) (literally: monthly tax unit) is a unit of account used in Chile to measure taxes, fines, etc. which is adjusted to inflation on a monthly basis. Unidad Tributaria Anual (UTA) (literally: annual tax unit) is the unit of account used in the Competition Act to regulate limits on fines, and is equal to 12 UTM (1 UTA = 12 UTM). On March 2014, 1 UTM = CLP \$41.263 = USD \$72,13 (\$1 USD = \$572 CLP on 03/17/2014), and 1 UTA = CLP \$495.156 = USD \$565,65.



In this case the fine is reduced by 25%, considering (i) the duration of the harmful event and its consequences, and (ii) the scope of the agreement (the segment of customers affected). The Supreme Court also considered the fact that the defendant had no prior convictions for breaching competition law.

**Paragraph 18:** “[...], to determine the fine, it is necessary to consider objective and subjective circumstances that constitute a punishable fact and its consequences. Therefore, one of several factors that will be taken into consideration in determining the amount of the fine to be applied is the duration of the harmful event and its consequences over time. Indeed, it is undisputed that the rise in rates occurred from January 2005; however, since January 2003 the defendant has failed to recover the special petroleum tax. In addition, the rise was maintained from January 2005 to November 2007 –the date of the Complaint– which led Edelmag to obtain higher profits than normal, only in what concerns retail customers, without affecting commercial/industrial customers or the Navy (high voltage customers, subject to AT2 rates) or street lighting, commercial clients and public institutions (low voltage customers, subject to BT2 rate).

**Paragraph 19:** “[...] Considering what is stated in the previous paragraph, and also considering that Edelmag has not been the subject of no prior Complaints, this Court – accepting the alternative claim that the defendant has made– determines the fine in the amount that will be established in the operative part of this Decision”.

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		Failure	
6.	FNE'S COMPLAINT vs.	to	Teleco
	EL SR. JOHN C.	comply	mmuni
	MALONE. DECISION	a	cation
	117.	judgme	s
		nt	
			<b><u>Reduced (-100%)</u></b>

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In this case the fine is eliminated, although the Supreme Court did not reversed the TDLC's decision but for the establishment of a fine. The main (and only reason)

exposed by the Supreme Court to waive payment of the fine is the collaborative attitude of the defendant, which would indicate that his intention was not to infringe competition rules.

### *Summary of the case*

In March 2008 the FNE filed a complaint against John Malone, controller of VTR, one of Chile's telecommunication companies. VTR had merged with another telecommunications company in 2004. One of the conditions for allowing the merger was that VTR had to abstain itself from participating in the satellite TV market. Nevertheless, John Malone acquired indirectly part of DirecTV Chile, a satellite TV operator, infringing the condition imposed by the TDLC when approving the 2004 merger. The FNE was able to prove the infringement of the conditions, and in December 2011, the TDLC issued a unanimous condemnatory sentence against John Malone.

### *Fine requested by the FNE*

The FNE requested a fine of UTA 2.000<sup>19</sup>. The considerations that led the FNE to request this fine were as following:

- (i) The seriousness of the offence. In 2004 the TDLC authorized a merger that strongly increased the concentration in the relevant market. This fact imposed a special duty to VTR as the dominant firm in the cable television market.
- (ii) The 2004 conditions prohibited any kind of acquisitions in the satellite TV market, even small shares acquired indirectly. Nevertheless, John Malone acquired the control of DirecTV.
- (iii) The acquisition impedes the development of paid TV in Chile since VTR is the dominant company in the cable TV market and DirecTV was one of its competitors.
- (iv) The FNE warned John Malone of this infringement before the acquisition of DirecTV's control was made. But the warning was ignored.

### *Fine imposed by the TDLC*

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<sup>19</sup> [http://www.tdlc.cl/DocumentosMultiples/Requerimiento\\_FNE\\_C\\_156\\_08.pdf](http://www.tdlc.cl/DocumentosMultiples/Requerimiento_FNE_C_156_08.pdf), 13.

The TDLC found that John Malone had breached the conditions established for the 2004 merger. This justified imposing a measure and a penalty, both provided for in Article 26 of DL No.211. The first measure had the aim of obliging John Malone to sell its ownership in DirecTV Chile, within a short but reasonable time. For the purposes of determining the amount of the fine, the TDLC considered that the seriousness of the conduct, the economic benefit and previous offenses, must be taken into account<sup>20</sup>.

The TDLC found that there was ample evidence that Mr. Malone was the controller of VTR and because of this quality was aware of the conditions imposed in 2004 and that while remaining VTR controller and knowing the condition affecting VTR, he acquired and maintained until now shares of DirecTV Chile. Despite being warned of the wrongfulness of such conduct by the FNE when the investigation was initiated, he continued to infringe the conditions imposed. His conduct not only affected the legality of the 2004 merger but also generated adverse market effects. It enabled a company with a dominant position in the cable TV market to influence, through a common controller, its competitor, DirecTV. The offence reported VTR important economic benefits since it strengthened VTR's dominant position in the market. The offence was maintained for almost three years. The Tribunal, however, noted that Mr. Malone was not a repeated offender. Consequently, the TDLC imposed a fine of UTA 4,000.

#### *Fine reduced by the Supreme Court*

During the procedure, the Supreme Court proposed some guidelines for a conciliatory agreement to the parties (FNE and John Malone). The agreement was reached on April 2013 and included provisions that ensured the compliance with the 2004 conditions. The agreement established in detail how and when Mr. Malone was going to sell its ownership in DirecTV. Also, Mr. Malone agreed to pay the FNE CLP 120 million (UTA 240/ USD 230.000) in order to cover the litigation costs. On the other hand, the FNE, taking into consideration that the settlement ensured compliance with the 2004 conditions, withdrew its claim to maintain the UTA 4,000 fine imposed by the TDLC.

The Final sentence was issued on June 2013<sup>21</sup>. Considering the agreement and that the FNE declined to further pursue the payment of the fine, the Supreme Court decided to waive the fine imposed by the TDLC. The main reason expressed by the Supreme Court was the collaborative attitude of the defendant, which would indicate that he had no intention to infringe competition rules. As a starting point of the discussion, the Supreme Court commented on the function of fines in the enforcement of competition law in Chile:

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<sup>20</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_117\\_2011.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_117_2011.pdf), 41.

<sup>21</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_117\\_Corte\\_Suprema.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_117_Corte_Suprema.pdf), 5.

**Paragraph 6:** “[...] it is useful to state that in competition law, including Chile, the fine appears to be the main form of sanction. In the discussion of the objectives of the sanctions, among others, factors of retribution and deterrence are usually mentioned. The retributive functions seek[] for the offender to receive his just punishment for the crime committed, while deterrence is looking to deter, discourage and prevent both the offender and other persons from committing offenses”.

The Supreme Court found that a consultation regarding an exchange of shares made by one of the companies of the VTR group demonstrated that John Malone had voluntarily tried to request an opinion of the TDLC before the FNE’s investigation. Therefore, it demonstrated that the defendant had no intent to engage in anti-competitive behaviour<sup>22</sup>. This argument of the defendant had been rejected by the TDLC since the company that made the consultation had no relation with John Malone at that time, and because the consultation was declared inadmissible and not even reviewed by the authorities. Nevertheless, the Court stated that the fine applied to John C. Malone appeared unnecessary and did not meet its purpose, since in the Supreme Court’s view, the activities of the defendant, namely, the voluntary notification to the TDLC of the merger as well as agreeing to meet the 2004 conditions, suggested a collaborative behaviour and a commitment to competition law<sup>23</sup>.

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	FNE'S	COMPLAINT					
7.	vs. TECUMSEH DO Collusio Industr 29-07- 29-06-						<b>Reduced (-52%)</b>
	BRASIL LTDA. <i>et al.</i> n ial 2010 2012						
	DECISION 122						

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In this case the fine is reduced 52%. Surprisingly, the Supreme Court did not make a thorough assessment of the criteria used to reduce the amount of the fine, relying primarily on prudential considerations. The Supreme Court argued that a lower fine also met the deterrence and retribution objectives of fines in competition law.

### *Summary of the case*

In 2010, the FNE filed a complaint against Whirlpool S.A. and Tecumseh Do Brasil Ltda., the main providers of low power, hermetic compressors for the manufacturing

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<sup>22</sup> Supreme Court’s judgment, para 8.

<sup>23</sup> Supreme Court’s judgment, para 9.

of refrigerators, which have been participating in an international cartel since 2004. As a result of the cartel, prices increased more than 80% between 2004 and 2008. This also resulted in higher prices for refrigerators in the Chilean market (this input represents about 20% of the refrigerators' total cost). Both companies were fined in a number of jurisdictions.

The case is of particular interest for Chilean competition law, as it constitutes the first case in Chile in which the tribunal made use of the leniency program for the detection of cartels, hence representing a milestone in the history of cartel persecution in Chile. In particular, Tecumseh constitutes the first company that met the legal requirement to be exempted from any fines. The TDLC ruled unanimously against the two companies and fined Whirlpool for the sum of UTA 10,500 (approximately US\$ 10 million) plus legal expenses.

#### *Fine requested by the FNE*

The FNE requested a fine of 15,000 UTA<sup>24</sup>. During the trial process, the FNE submitted to the TDLC an economic report that justified the amount of fine requested on the basis of the estimation of the excess gains obtained by the cartel<sup>25</sup>.

The estimation of excess gains required the determination of the duration of the cartel as well as the overprice charged during the price-fixing period. Tecumseh fully collaborated with information and data, as opposed to Whirlpool, who delivered inexact and incomprehensive data, impossible for use in the analysis. As a result, the FNE relied exclusively on the Tecumseh data and used extrapolation to draw results on Whirlpool.

The duration of the cartel was determined by qualitative information obtained by Tecumseh, according to which the cartel dated back to the beginning of 2004 and terminated around February of 2009.

For the determination of a counterfactual, it was assumed that after the termination of the agreement the two firms returned gradually towards more competitive levels until December 2009, by which time the market had fully returned to competitive conditions. Excess gains were then estimated using the profit margin of December 2009 as a counterfactual. The excess profits were then estimated as the real profits obtained by the two firms minus the profits that would have been obtained had

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<http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20de%20la%20FNE%20contra%20Tecumseh%20Do%20Brasil%20Ltda.%20y%20otro.pdf>

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[http://www.tdlc.cl/DocumentosMultiples/Informe%20Econ%20C3%B3mico%20Paula%20Rold%C3%A1n%20y%20Francisco%20Caravia%20\(FNE\).pdf](http://www.tdlc.cl/DocumentosMultiples/Informe%20Econ%20C3%B3mico%20Paula%20Rold%C3%A1n%20y%20Francisco%20Caravia%20(FNE).pdf)

margins been at the level of December 2009. The use of profit margins instead of prices for the estimation of the cartel's profits addressed Whirlpool's defence that associated the high prices during the period of collusion to the rising cost of essential inputs for the production of compressors, such as iron. Finally the cartel profits were calculated by adding the actual profits obtained by the two firms during the cartel, and then by subtracting the profits that it would have earned had margins been at the December 2009 level.

Overall, it is estimated that margins were varying between 100% and 140%, during collusion, far in excess of the 33% observed in December 2009. According to the above, Tecumseh gained the sum of CLP 4.4 billion, or approximately USD 8.5 million.

Excess profits for Whirlpool were estimated by means of proportionality using the average market share of Whirlpool for the period of 2004-2009, which was at 58%. This brought excess profits at CLP 7.2 billion, or USD 14 million. The FNE then requested a fine equal to the excess gain obtained by the cartel, amounting to approximately UTA 15,000.

#### *Fine imposed by the TDLC*

The TDLC considered that the cartel and its effects were proven and sentenced Whirlpool to pay a fine of UTA 10,500<sup>26</sup>. The fine is lower than the one proposed by the FNE. Even if the TDLC used similar steps than the FNE to estimate Whirlpool's cartel benefits, it made some changes in the formula that diminished the final amount. In the first place, the FNE considered as a profit margin benchmark Tecumseh's margin of September 2009. The TDLC, on the other hand, considered Tecumseh's average profit margin in the last four months of 2009, which led to a higher benchmark. In addition, the TDLC considered that the collusive agreement had only started in January 2005 and not in 2004, as the FNE argued. Thus, with these modifications of the FNE's calculations, the TDLC imposed a lower fine.

#### *Reduction of the fine by the Supreme Court*

Whirlpool brought the case before the Supreme Court<sup>27</sup>, which issued a judgement on September 2013. Among other things, Whirlpool claimed that the TDLC had no jurisdiction - because the cartel occurred outside of Chile - and that the infraction had already been punished (*ne bis in idem* principle). The Supreme Court rejected both arguments and added that "no foreign jurisdiction has considered or punished the events that occurred and had affected the domestic market."

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<sup>26</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_122\\_2012.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_122_2012.pdf), 56.

<sup>27</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_122\\_Corte\\_Suprema.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_122_Corte_Suprema.pdf), 32.

Regarding the fine, the Court expressly stated that it agreed with the amount of the fine imposed by the TDLC, considering that TDLC's calculation aimed to estimate the benefits that the agreement would have generated for Whirlpool SA, and that calculation was not marred by any significant error. Furthermore, the Court found that the fine adequately reflected the seriousness of the offense and that, in order to be effective, the penalty had to serve as a deterrent instrument. Nevertheless, after that statement, the Court considered that the deterrence and retribution objectives of fines sought in competition law would also be achieved if the fine was "reasonably" reduced. According to the Court,

**Paragraph 30:** [...] Notwithstanding the above and even if this Supreme Court agree[s] that the amount of the fine imposed by the TDLC shows the seriousness of the offense and the fact that for a fine to be an effective deterrence instrument it needs to be sufficiently high in order to constitute a significant amount to the offender; this Supreme Court believes that the deterrent and retributive penalty function is fully satisfied with a reasonable decrease of the amount established by the decision under appeal. So, this Court will grant this request to the appellants.

Consequently, the fine on Whirlpool was reduced from 10,500 to 5,000 UTA (approximately US\$4.9 million).

This decision surprised the Competition experts in Chile and initiated a discussion that was mainly centred on the lack of dissuasive effects of the Chilean fines in competition cases<sup>28</sup>. Some authors have criticized the perceived lack of motivation and inconsistency in the reduction of the fine in this case by the Supreme Court, arguing that it would have been appropriate to recall the level of penalties levied on Whirlpool in other jurisdictions for this international cartel<sup>29</sup>. Certainly, the size of Whirlpool's market share was not the same in Chile, the size of the market was different, and the penalties were mostly the product of a settlement, yet their size was considerably larger than the level of the penalty accepted by the Supreme Court. For instance, in Brazil the penalty imposed was of the level of USD \$ 53 million, in the United States \$ 49 million USD, and in Europe € 54 million. These fines are already reduced because Whirlpool had accepted responsibility, thus saving the social costs of litigation. This was not the case in Chile where Whirlpool opted to litigate, thus increasing the social costs of its conduct. A further objection to the approach followed by the Supreme Court in this case related to the need to ensure an optimal interaction between the level of penalties imposed and the design and operation of the leniency programme. It is necessary to impose on infringers severe penalties when acting illegally in order to enhance their *ex ante* incentives to

<sup>28</sup> <http://lalibrecompetencia.com/2013/09/26/cartelicense-no-mas-la-negativa-senal-de-la-corte-suprema-chilena-en-un-caso-reciente/>

<sup>29</sup> Araya Jasma, F. (2013) "Derecho de la Libre Competencia", *Revista Chilena de Derecho Privado* 21, 433-445.

enter into leniency programmes. An important asymmetry should exist between the company that voluntarily gives information and cooperates (in this case Tecumseh), and those that took a negative stance on cooperation (in this case Whirlpool). The reduction in the fine granted by the Supreme Court reduced this asymmetry, weakening the proper functioning of the Chilean leniency programme.

Other authors remarked that according to established practice, the fine should be at least equal to the economic benefit obtained from the cartel multiplied by the probability of detection<sup>30</sup>. However, the Supreme Court had proceeded in this case to a reduction of more than 50% of a fine representing the cartel profits that the same Court had considered were correctly calculated by the TDLC. According to these authors, the Supreme Court sent the wrong signal to the market that building a cartel does not really matter, since the fine will always be less than the economic benefit procured by such infringement. It was further argued that the lack of qualitative reasons to reduce the fine rendered the impact of the Supreme Court's judgment in this case highly negative for the Chilean competition law system. First it gave the feeling that white collar crime was not appropriately sanctioned. Second, the judgment also adversely affected the predictability and certainty of the Chilean system of sanctions. It created a perverse incentive for the FNE and the plaintiffs to request higher fines since there is a high probability that they will be diminished by the Supreme Court. The same author argued that this case illustrates how important it would be for the courts to rely not only on qualitative criteria but also mechanisms enabling them quantitatively to determine the amount of the penalty. The TDLC had moved in this direction, but the Supreme Court annulled the effects of its effort.

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There have also been some rare cases in which the Supreme Court has increased the fines imposed.

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	FNE'S	COMPLAINT				
8.	vs. Transportes Central Ltda. y Otros,	Collusion	Transport	18-12-2007	29-12-2010	<b>Increased</b>
	DECISION 94.	n	ort			

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### *Summary of case*

In 2008, the FNE filed a complaint against 9 minibuses transport companies and 4 taxi transport companies that provided services in Osorno, a southern city of Chile.

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<sup>30</sup> Tapia, J. (2013) "La aplicación de multas a agentes económicos en el Derecho Chileno de la Libre Competencia, Una propuesta Metodológica" *Estudios Públicos* 132, 71-105.



The FNE argued that the companies had colluded and increased the transport fares, among other infringements.

The TDLC found that 8 of the transport companies and the 4 taxi transport companies that provided services in Osorno had engaged in anticompetitive conduct by reaching an agreement to increase their fares. An interesting feature of this set of collusive practices was that they were orchestrated by the Regional Secretary of the Ministry of Transport.

#### *Fine requested by the FNE*

The FNE's complaint was brief and requested a 100 UTA fine for the instigators of the agreement and a 50 UTA fine for the companies that were coerced to enter into the agreement<sup>31</sup>. There is no analysis of the benefits received by the companies and no economic reports were presented.

#### *Fine imposed by the TDLC*

On January 2010 the TDLC issued a judgement, holding that the cartel and its effects were proven<sup>32</sup>. For the purposes of determining the amount of the fine, the TDLC considered article 26.c DL No. 211, stating that the seriousness of the conduct, the economic benefit and previous offenses, should be taken into account.

The TDLC found that the fares increase was of 50% for the minibuses and of 17% for the taxies, and that the fine should at least be equal to the economic benefit obtained by the involved companies. Nevertheless, the Tribunal noted that since the Regional Secretary of the Ministry of Transport induced the agreement, or at least helped to reach it, companies should not be heavily fined. Furthermore, some companies' liability was alleviated since they were intimidated or forced to sign the agreement. Finally, the Tribunal noted that the number of vehicles owned by every company should be taken into account when determining the fines. The TDLC decided to impose fines of UTA (*Unidad Tributaria Anual*) 12, 8, 7, 4, and 3 to the different transport companies according to the weighting of the abovementioned factors.

#### *Fine increased by the Supreme Court*

The transport companies and the FNE appealed and brought the case before the Supreme Court,<sup>33</sup> which rejected the claims submitted by the transport companies and granted in part the FNE's petition to increase the fines. The Supreme Court

<sup>31</sup> [http://www.tdlc.cl/DocumentosMultiples/Requerimiento\\_FNE\\_C\\_149\\_07.pdf](http://www.tdlc.cl/DocumentosMultiples/Requerimiento_FNE_C_149_07.pdf)

<sup>32</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_94\\_%202010.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_94_%202010.pdf)

<sup>33</sup> [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_94\\_Corte\\_Suprema.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_94_Corte_Suprema.pdf), para 12.

found that collusion was the most serious of all anticompetitive behaviours. It also found that the circumstance of the Regional Secretary of the Ministry of Transport's intervention could diminish the liability of the involved transport companies, but not in such a magnitude as that considered by the TDLC. Therefore, the Supreme Court increased the fine of 2 of the transport companies to UTA 50 and increased the fine of 3 of the transport companies to UTA 35.

### **3. Proposals for reform**

In recent years, there has been considerable attention brought to the analysis of the fining policy of the FNE and the TDLC and the impact of the Supreme Court's jurisprudence on the level of fines. A wide-ranging study, published in 2012, provides a thorough analysis of the fines imposed by the TDLC and the modifications brought by the Supreme Court's judgments. The study includes tables comparing the imposed fines in the cases examined by the TDLC between 2008 and 2010. The study found that in the eight cases where a fine was imposed, and that was later reviewed by the Supreme Court, the latter has always modified the fine, increasing it in two occasions and diminishing it in six of them<sup>34</sup>.

There are various reasons provided by the Supreme Court to alter the amount of fines imposed by the TDLC. One of the reasons commonly put forward, in at least three occasions, was that the considerations taken into account by the TDLC for determining the amount of the fine were not developed enough. Other reasons for lowering the amount of the fines related to the following factors: irreproachable past conduct of the defendant; proportionality; duration of the infringement; cooperative behaviour of the defendants; the fact that some aggravating circumstance was not applicable; that there was no information about the benefit obtained by the offence; and that the fine recommended by the FNE and accepted by the TDLC exceeded the maximum applicable by law at the time the infringement was done. The study showed that fines had been enforced in less than 28% of all the cases brought by the FNE until then<sup>35</sup>. The study also noted that the largest fine in Chile's Competition Law history at the time (2010) was 40 % of the maximum allowed, and that the average amounted to 845 UTA. The medium was only UTA 95.5, equivalent to 0.5% of the maximum allowed. This information should be put into perspective if we consider that the Supreme Court has diminished fines by about 28% on average. The study further argued that if we take international comparisons into account, the maximum fine allowed in Chile was particularly low, although from a national perspective, it might be considered as substantially higher from those applicable in

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<sup>34</sup> Romero Guzmán, J.J. (2012) "Enforcement, Sanciones y Multas en el sistema de libre competencia Chileno" in *La Libre Competencia en el Chile del Bicentenario*, Santiago, Centro de Libre Competencia UC – Thomson Reuters, 503-537. Tables are available at pages 526, 527 and 529 of the study.

<sup>35</sup> Idem 535.

the regulation of the banking sector, sanitary sector, electricity and fuel sector, telecommunications sector, securities and the insurance sector<sup>36</sup>. Yet, as it was remarked by the study, in view of the difficulty of detecting competition law infringements, such as secret cartels, the FNE has a considerable disadvantage in comparison with the regulatory authorities, active in the above sectors, thus explaining why the penalties should be set at a higher level.

In July 2012, a committee of well-known academics<sup>37</sup> issued a report, which was submitted to the former president, Mr. Piñera. The report made recommendations to modify some aspects of Chile's competition law system. Regarding the issue of fines, the members of the Commission envisaged possibilities to improve the current system. The Commission recommended that the fines imposed on companies should be based on some kind of scale or indicator, since determining the caused damage or the obtained profits from the illicit practice may be a very difficult operation. Specifically, the Commission recommended that fines should be estimated according to a percentage of the company's annual sales during the period of the infringement plus an amount that would act as a deterrent.

The Commission noted that the maximum amount of fines was recently raised by the legal reform of 2009 from 20,000 to 30.000 UTA. However, in the view of the Commission, this adjustment has made no difference since imposed fines have been generally far under the maximum permitted amount. In particular, it did not send a signal regarding the negative impact of anticompetitive behaviour and the importance lawmakers attached to the increase of the level of fines. The Commission observed that in practice fines had not increased.

The Commission also made other recommendations such as to include criminal sanctions for top executives of the involved firms with the prohibition of serving as directors in publicly traded companies, or in managing positions during a period of 5 years. Criminal sanctions were recommended only by part of the Commission. In this matter opinions were divided.

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<sup>36</sup> A table compares the applicable fines in all these sector-specific regulations at page 531.

<sup>37</sup> Tomás Flores Jaña, Francisco Rosende Ramírez, Aldo González Tissinetti, Arturo Yrarrázaval Covarrubias, Blanca Palumbo Ossa, Domingo Valdés Prieto, Francisco Agüero Vargas, Ricardo Jungmann Davies, Ronald Fischer Barkan, Anita Holuigue Barros, Enrique Vergara Vial, Jorge Rodríguez Grossi, Hermann von Gersdorff Trömel.

## C. A comparative perspective: tour d' horizon of the practice of judicial scrutiny and the role of the courts in promoting effective competition law enforcement

### 1. The EU level

In *Les Verts v. European Parliament*, the Court of Justice of the EU (CJEU) emphasized that the European Community is a community based on the rule of law, inasmuch as neither its Member states nor its institutions can avoid judicial review of their actions to determine whether those actions are in conformity with the Treaty<sup>38</sup>. The control of legality exercised by the European judiciary of the measures adopted by the European institutions constitutes the cornerstone of this institutional framework.<sup>39</sup>

There are two routes to contest the legality of the remedial action of the European Commission. First, Article 263 TFEU provides that the Court may review the legality of the decisions or acts of the Commission that are capable of affecting the interests of individuals. Challenges are made at first instance to the General Court of the EU,<sup>40</sup> and appeals on points of law can be made from the General Court to the CJEU. Second, the judicial control of the appropriateness of the amount of fines is more intensive, following the interplay of Article 261 TFEU and of Article 31 of Regulation 1/2003. Pursuant to these provisions, the CJEU is endowed with unlimited jurisdiction to assess the appropriateness of, and if necessary to vary, downward or upward, the amount of the fine imposed by the Commission. Hence, it has judicial scrutiny over material errors of law, facts, procedural irregularities, unreasonable exercise of discretion, and, under certain circumstances, also over evaluative judgments and predictions of the European Commission. The Court is not able to impose a different fine but to rule on existing fines set by decisions of the Commission<sup>41</sup>.

Concerning the possibilities of challenging the decisions of the European Commission, those to which the latter are directly addressed, together with third parties who can demonstrate “direct and individual concern” (such as, inter alia, competitors), may file an appeal with the General Court. The grounds of review are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, and misuse of

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<sup>38</sup> Case C-294/83, *Les Verts v. Parliament* [1986] ECR 1357, para. 23.

<sup>39</sup> The General Court was called Court of First Instance, before the entry into force of the Treaty of Lisbon in December 2009. It was originally set up in 1989. The Court of Justice (ECJ) is assisted by Advocates general who deliver an opinion on a case prior to the judgment of the ECJ.

<sup>40</sup> A fast track procedure is available in certain cases. See codified rules of the General Court, Art. 76a.

<sup>41</sup> Case T-275/94, *Groupeement des cartes bancaires "CB"/Commission* [1995] ECR II-2169, paras 59 & 60. See e.g. GERARD, ‘EU cartel law and the shaking foundations of judicial review’, (July 10, 2010). Available at SSRN: <http://ssrn.com/abstract=1675451> at 4.

powers. The European Courts do not exercise a formal appellate jurisdiction on the merits, but a simple control of legality, although with regard to fines they may substitute their own assessment to that of the European Commission. Yet, as we have previously noted, this is limited to the grounds of the Commission's decision that were found illegal.

The intensity of review is traditionally a limited one under Article 263 TFEU. The General Court cannot “remake” the Commission's decision or inquire on the merits of it, but it can only verify whether the Commission has produced sufficiently precise and coherent proof to support its case, whether it has misinterpreted or misapplied the law, or has made a “manifest error of appraisal” in the statement of the facts or the assessment of the evidence before it, so that the latter cannot support its conclusions as to the nature—whether unlawful or otherwise—of the practice<sup>42</sup>. However, since its creation in 1989, the General Court has intensified the judicial control of the Commission's decisions, as it is now possible to conduct a systematic examination of the factual basis of the decision of the Commission. The CJEU focuses more on questions of law than questions of facts. However, the General Court has traditionally not interfered with the exercise by the Commission of complex economic and technical appraisals unless there is a manifest error.<sup>43</sup> Some observers are of the view that the General Court varies the intensity of judicial review across the judicial control exercised in applications of Article 101(1), 101(3), 102, or merger control. Others interpret the recent Court cases to indicate that the intensity of judicial review has been raised to, in substance, full judicial review across the board. Since the annulment of the three merger decisions *Schneider*, *Tetra Laval* and *Airtours*,<sup>44</sup> the General Court pays only lip service to the marginal review standard, and in substance exercises full judicial review of infringement decisions.<sup>45</sup>

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<sup>42</sup>See e.g. case 42/84, *Remia and others v Commission*, [1985] ECR 2545, para. 26.

<sup>43</sup>Case T-201/04, *Microsoft v. Commission* [2007] ECR II-3601, para 87-89.

<sup>44</sup>Case T-342/99, *Airtours plc v. Commission* [2002] ECR II-2585; Case T-77/02, *Schneider Electric SA v Commission*, [2002] ECR II-4201; Case T-80/02 *Tetra Laval BV v Commission*, [2002] ECR II-4519; Case C-12/03P, *Commission v. Tetra Laval* [2005] ECR I-987.

<sup>45</sup>Editorial Comments (2011) “Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights” *Common Market Law Review* 48, 1405, 1406; Schweitzer, H. (2013) “Judicial Review in EU Competition Law”, in Lianos, I. and Geradin, D. (eds) *Handbook on European Competition Law*, Edward Elgar 537. (“Despite the much-repeated ‘margin of discretion’ formula, the consistent exercise of full judicial review with a view to the interpretation and the application of substantive competition law is at its core. [...] The Commission continues to enjoy a margin of discretion that is beyond full judicial review only where it enjoys real policy discretion.”); Wils, W.P.J. (2014) “The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in which the European Commission Acts both as Investigator and as First-Instance Decision Maker” *World Competition* 37, 5, 15-16 (“I do not have the impression that the General Court, even in those cases, such as the Microsoft case, where it stated that its review was limited to manifest errors, in fact abstained from exercising a full review in respect of all the pleas raised by the applicant against the Commission's decision”). See also Forwood, N. (2011) “The Commission's ‘More Economic Approach – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review” in Marquis, M. and Ehlermann, C.-D. (eds.), *EUI Competition Law Annual 2009*, Oxford: Hart Publishing, 255, 264.

The review has been “rigorous” (in particular for mergers and Article 101(3)<sup>46</sup>, as well as in Article 102 cases).<sup>47</sup> In other recent cases, however, the European Court of Justice has supported and emphasized the wide degree of discretion of the European Commission, for example in the adoption of commitment decisions under Article 9 of Regulation 1/2003 (negotiated remedies), by applying differently the principle of proportionality in this context than for decisions adopted under Article 7 (imposed remedies)<sup>48</sup>. Upon annulment, the case is remitted to the Commission for a fresh examination of the issues or evidence.

The intensity of review under Article 261 TFEU is a higher one. The General Court has not shied away from subjecting the Commission’s decisions on fines to strict scrutiny, in view of the “unlimited jurisdiction” it disposes with regard to penalties. The scope of this “unlimited jurisdiction” was exposed by the CJEU as being relatively broad, the EU judicature being “empowered to exercise its unlimited jurisdiction where the question of the amount of the fine is before it”<sup>49</sup>. Yet, the “unlimited jurisdiction” from which the General Court benefits may be subject to various interpretations. Commenting on the meaning in practice of the term, former President of the General Court, Bo Vesterdorf observed the following:

“Even if Article 23(3) of Regulation 1/2003 only indicates that the elements to be taken into consideration in calculating the fine are gravity and duration, it follows clearly from the case-law that the Commission, and therefore certainly also the Community Courts, must consider all relevant facts and circumstances of the case [...] which must include the overall general fairness of the sanction on view of all the general circumstances of any particular case. The unlimited jurisdiction granted to the Community Courts under Article 31 of Regulation 1/2003 and Article [261 TFEU] permits them to perform precisely this type of assessment. In view of the ever increasing level of fines imposed by the Commission, fines which now may amount to more than one billion Euros on a single undertaking and who knows how much more next time [...] it is my humble submission that it is not so much necessary that the

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<sup>46</sup> See, Case C-12/03P, *Commission v. Tetra Laval* [2005] ECR I-987 (mergers); Case T-168/01, *GlaxoSmithKline Services v. Commission* [2006] ECR II-2969, confirmed by case C-501/06P, *Commission v. GlaxosmithKline Services Unlimited* [2009] ECR I-9291. See also Vesterdorf, B. (2005) “Standard of Proof in Merger Cases” *European Competition Journal* 1(1), 3-33., in particular 17-19.

<sup>47</sup> Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, para. 89: “[W]hile the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission’s interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, concerning merger control, Case C- 12/03 P *Commission v Tetra Laval* [2005] ECR I- 987, paragraph 39).”

<sup>48</sup> See, more recently case C-441/07, *Commission v. Alrosa* [2010] ECR I-5949.

<sup>49</sup> Case C-3/06 P *Groupe Danone v. Commission* [2007] ECR I-1331, para. 62.

Community Courts fully exercise their unlimited jurisdiction and not just verify if the Guidelines have been correctly followed by the Commission”<sup>50</sup>.

The approach followed by the EU Courts has been variable. The General Court has proceeded to an intensive scrutiny of the Commission’s decision, eventually substituting its own interpretation of the law, when they found that the Commission’s decision was based on errors of law. For instance, in view of Article 23(3) of Regulation 1/2003, the Commission is bound to take into account both the gravity and the duration of the infringement. In addition, the Commission has adopted Guidelines binding its own discretion, in view of the principle of legitimate expectations, with the aim to ensure greater legal certainty for undertakings. The Court thus makes sure that the legal framework of Regulation 1/2003 is respected, as well as general principles of EU law (e.g. proportionality), while it also interferes with the methodology adopted by the Commission in a specific case, if this does not comply with the methodology advanced by the Commission in its Guidelines, according to the principles of EU administrative law<sup>51</sup>.

With regard to errors of facts or unreasonable exercise of discretion, the General Court has been attentive to situations such as that in *GDF-Suez*, in which the General Court reduced the fine as the Commission had not established to the requisite legal standard the duration of part of the infringement. The Court reduced the fine, but not according to the Commission’s methodology, as this would have led to a “greatly disproportionate” reduction “to the relative importance of the error which has been found to exist”, as this would have resulted in a reduction of the fine of more than 50%<sup>52</sup>.

Although the Court has mentioned in several occasions that in exercising its unlimited jurisdiction, “it must make its own appraisal, taking account of all the circumstances of the case”, it has been relatively reluctant to depart from the methodology set out in the Commission’s Guidelines<sup>53</sup>. For instance, the Court referred to the 2006 Guidelines of the European Commission and the Commission’s previous decisional practice as useful “guidance” in order to calculate the fine<sup>54</sup>. Although it is clear that the EU Courts do not consider these Guidelines binding on them, they have, on certain occasions held that they may have to rely on the

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<sup>50</sup> Vesterdorf, B. (2009) “The Court of Justice and Unlimited Jurisdiction: What does it mean in practice?” *Antitrust Chronicle* 6.

<sup>51</sup> According to the case law of the CJEU, in Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2006] ECR I-4429, para 91, “[...] the Commission must comply with its self-imposed rules”). See also, Case C-389/10 P, *KME Germany and Others v Commission*, para 127, “[...] Guidelines are a case of self-limitation on the Commission's part”.

<sup>52</sup> Case T-370/09 *GDF Suex v. Commission* [2012] ECR not yet published, para. 466.

<sup>53</sup> Case T-360/09 *E.ON Ruhrgas v. Commission*, para. 301; Case T-370/09 *GDF Suex v. Commission* [2012] ECR not yet published, para. 462.

<sup>54</sup> See, for instance, Case C-441/11 P, *Commission v. Verhuizingen Coppens*, [December 6, 2012], not yet published, para. 80; Case T-357/06, *Koninklijke Wegenbouw Stevin v. Commission* [September 27, 2012], paras 253-255.

methodology set forth when reviewing the fine, as the exercise of unlimited jurisdiction cannot result in discrimination between undertakings which have participated in anticompetitive conduct<sup>55</sup>. According to some commentators, “(i)n recent judgments this standard of review seems to be interpreted by the Court as [...] ensuring that the considerations which the Commission relied on are ‘coherent and objectively justified’, which implied that ‘the Courts must not immediately substitute their own assessment for that of the Commission’; or as controlling that the fine is proportionate to the gravity and duration of the infringement and weighing the gravity of the infringement and the circumstances invoked by the applicant”<sup>56</sup>. It is not clear which are the limits of the discretion that the Commission is offered, in the presence of a complex economic and technical appraisal. Most would agree that the “policymaking discretion” of the Commission should be protected; yet, what about “executing discretion”? According to some commentators, “it is doubtful that, for instance, granting a reduction of the fine to an undertaking which benefits from the leniency procedure by taking into consideration only the timing, as opposed to the usefulness and quality of the information, requires any complex assessments”<sup>57</sup>.

In any case, the powers of review are ostensibly confined to a “manifest error”-type review when the appeal relates to the complex economic and legal assessment of the findings made by the Commission as to the nature and impact of the alleged infringement<sup>58</sup>. The General Court has explained in a number of judgments that the limited nature of this scrutiny is justified by the need to preserve the “inter-institutional balance” within the Union and especially to prevent the Courts from encroaching upon the discretionary powers of the Commission in the area of competition policy<sup>59</sup>. This is also the case in the context of setting fines. On several occasions, the Court held that the Commission enjoyed a “wide margin of discretion when setting the amount of fines”<sup>60</sup>. The judicial control exercised in areas in which the Commission maintains discretion, such as “the starting amount of a fine or the uplift for duration” is limited to ascertaining that the Commission has not committed a manifest error<sup>61</sup>.

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<sup>55</sup> See, Case T-362/06, *Ballast Nedam Infra BV v European Commission* [Septemehr 27, 2012], paras 143-145.

<sup>56</sup> Barbier de la Serre, E. and Lagathu, E. (2013) “The Law on Fines Imposed in EU Competition proceedings: Faster, Higher, harsher” *Journal of Competition Law & Practice* 4(4), 325-344, 340.

<sup>57</sup> Barbier de la Serre, E. and Lagathu, E. (2013) “The Law on Fines Imposed in EU Competition proceedings: Faster, Higher, harsher” *Journal of Competition Law & Practice* 4(4), 325-344, 341.

<sup>58</sup> *Inter alia*, case T-112/99, *Metropole Television and others v Commission*, [2001] ECR II-2459, para. 114;

<sup>59</sup> E.g. joined cases T-68, 77-78/89, *Società Italiana Vetro SpA and Others v Commission*, [1992] ECR II-1403, para. 319-320; also case T-65/98, *Van den Bergh v Commission*, [2003] ECR II-4653, para. 135; more recently, case C-194/99 P, *Thyssen Stahl AG v Commission of the European Communities*, [2003] ECR I-10821, para. 73; case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, [2006] ECR II-2969, para. 57.

<sup>60</sup> For instance, Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, para. 134; Case T-336/07, *Telefonica v. Commission* [March 29, 2012], para 430.

<sup>61</sup> E.g., Case T-439/07 *Coats Holding v. Commission*, para. 185.



It could be argued that the General Court, despite being able to consider the extent to which the Commission provided a sufficiently clear and exhaustive statement of reasons in respect to the “necessity” of the amount of the fine in each case, remains constrained in its ability to appraise its suitability in light of the nature/gravity of the infringement and its duration. However, although it is acknowledged that the review powers of the EU Courts are limited to a “manifest error” type of review in cases involving complex economic appraisals, it should be noted that in some recent cases, the Court of Justice prescribed rigorous standards of judicial review for the decisions of the Commission by the General Court and established its full jurisdiction to review decisions in which the Commission imposes fines. In particular, the Court held that “the Courts cannot use the Commission's margin of discretion - either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines (of the Commission) [...] or as regards the assessment of those factors - as a basis for dispensing with the conduct of an in-depth review of the law and of the facts”.<sup>62</sup>

Yet, limits relating to the different functions of competition authorities and courts exercising a judicial review may limit judicial scrutiny of complex economic assessments<sup>63</sup>. The Commission is offered some “degree of latitude” as to the choice of interpretation of the economic elements that it takes into account in its decisions, “provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are not applied inconsistently”<sup>64</sup>. It is on the applicant to put forward reasons that the Commission’s effort “was not based on sound economics”<sup>65</sup>.

In the context of the exercise by the General Court of an unlimited jurisdiction on fines, it was suggested that “in practice [...] the case-law gives the European Commission significant leeway in the calculation of fines”<sup>66</sup>. First, the basic amount of the fine, which is related to the value of sales, depends on the gravity of the infringement, the latter being determined by reference to numerous factors, such as “the particular circumstances of the case, its context and the dissuasive effect of fines”, “no binding or exhaustive list of the criteria which must be applied” having been drawn up<sup>67</sup>. The Commission may thus be free to interpret the individual circumstances of the case and depart from its previous practice, if this is not part of

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<sup>62</sup> See, Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission* [2011] ECR I-13085, para. 62. See also, Case C-389/10 P *KME Germany AG, KME France SAS and KME Italy SpA v. European Commission*, [2011] ECR I-13125; Case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v. European Commission* [2011] ECR I-12789.

<sup>63</sup> Laguna de Paz, J.C. (2014) “Understanding the limits of judicial review in European Competition Law”, *Journal of Antitrust Enforcement* 2(1), 203-224,218.

<sup>64</sup> Case T-351/03, *Schneider Electric SA v. Commission* [2007] ECR II-2237, para. 132.

<sup>65</sup> Laguna de Paz, J.C. (2014) “Understanding the limits of judicial review in European Competition Law”, *Journal of Antitrust Enforcement* 2(1), 203-224,218, referring to a proposal made by Heike Schweitzer.

<sup>66</sup> Laguna de Paz, J.C. (2014) “Understanding the limits of judicial review in European Competition Law”, *Journal of Antitrust Enforcement* 2(1), 203-224,220.

<sup>67</sup> Case C-219/95 P *Ferriere Nord v. Commission* [1997] ECR I-4411, para. 33.

the legal framework<sup>68</sup>. Accordingly, the Commission may impose penalties at a higher level than the ones it has imposed in the past for certain categories of infringements, if raising the fines is considered necessary in order to ensure the implementation of competition policy and the objective of general prevention<sup>69</sup>. For instance, the General Court has only proceeded to a limited review of the multiplier applied to reflect the duration of the infringement, accepting that its “review of the lawfulness of the exercise of the Commission’s discretion in the matter must confine itself to checking that the thresholds set are coherent and objectively justified and the Courts must not immediately substitute their own assessment for that of the Commission”<sup>70</sup>.

The Commission benefits from a considerable margin of appreciation with regard to the individualization of the fine, in particular when it decides whether or not to take into account mitigating or aggravating circumstances. For instance, in order to determine the existence of aggravating circumstances, the Commission may take into account various factors, such as the nature of the infringement, the market share of the undertakings concerned, etc., the control of the General Court being limited to whether the Commission has departed from the methodology of the Guidelines, has proceeded to an increase that is “manifestly disproportionate”, or has refused to take into account other factors, such as the financial losses of the undertaking<sup>71</sup>. Similarly, with regard to mitigating circumstances, the Commission has been granted a degree of latitude in making the overall assessment of the extent to which a reduction of fines may be made<sup>72</sup>. The General Court has carried out, for instance, a limited review of the assessment made by the Commission of the cooperation provided by undertakings in order to benefit from the reduction of the fine<sup>73</sup>. In addition, the General Court has recognized the Commission’s discretion in calculating the

<sup>68</sup> Case C-167/04 P *JCB Service v. Commission* [2006] ECR I-8935, para. 205; Joined Cases C-125/07, C-133/07 P, C-135/07 P and C-137/07 P, *Erste Group Bank AG etc v. Commission* [2009] ECR I-8681, para. 233.

<sup>69</sup> Joined Cases 100/80 to 103/80 *Musique diffusion française and Others v. Commission* [1983] ECR 1825, para. 109; case T-23/99 *LR AF 1998 v. Commission* [2002] ECR II 1705, paras 236-237; Case T-76/08 *El du Pont de Nemours and others v. Commission* [February 2, 2012] ECLI:EU:T:2012:46, para. 126.

<sup>70</sup> Case T-76/08 *El du Pont de Nemours and others v. Commission* [February 2, 2012] ECLI:EU:T:2012:46, para. 127.

<sup>71</sup> Case T-25/05, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2010] ECR II-91, paras 114-117.

<sup>72</sup> Case T-83/08, *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v Commission* [2012] ECLI:EU:T:2012:48, para. 240, “(t)he adoption of the Guidelines has not rendered irrelevant the previous case-law under which the Commission enjoys a discretion as to whether or not to take account of certain matters when setting the amount of the fines it intends imposing, by reference to the circumstances of the case. Thus, in the absence of any binding indication in the Guidelines regarding the mitigating circumstances that may be taken into account, it must be concluded that the Commission has retained a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of mitigating circumstances”.

<sup>73</sup> E.g. Case T-76/08 *El du Pont de Nemours and others v. Commission* [February 2, 2012] ECLI:EU:T:2012:46, paras 138 and 145; Case T-77/08 *Dow Chemicals v. Commission*, [2012] ECLI:EU:T:2012:47, para. 164.

deterrent effect of the fine, exercising a limited review in this case<sup>74</sup>. Judicial scrutiny is also limited in the context of the appreciation by the Commission of the quality and usefulness of the cooperation provided by the undertaking, the Commission enjoying some discretion when considering the application of leniency, in particular by reference to the contributions made by other undertakings<sup>75</sup>. Only an obvious error of appraisal may be censured, the complainant having to show that in the absence of the information provided, the Commission would not have been able to prove the infringement.

In a recent wide-ranging statistical analysis of the judicial review of the Commission's decisions before the European Court of Justice and the General Court in the period of 2001-2005, Tridimas and Gari observe that out of 344 actions for annulment launched before the General court (then named CFI) during the period 2001-2005, 98 were contested competition decisions (28.8%) and 57 (16.8%) contested state aids<sup>76</sup>. According to the authors, "(a)ctions lodged against competition measures are the most likely to succeed with a rate of success of 44.9 per cent", the measure of success being the total or partial annulment of the decision or the revision of the fine<sup>77</sup>. These findings may indicate that judicial oversight of the European Commission's decisions in competition law has an impact on competition law enforcement and does not constitute a mere formal rubber stamping exercise, despite the considerable discretion given the Commission in complex economic and technical appraisals<sup>78</sup>. This is particularly so in view of the intensive judicial scrutiny exercised over the amount of the fine imposed by the Commission.

A recent empirical study of Camesasca, Ywesyn, Weck and Bowman (2013) has delved into the cartel precedents of both the General Court and the Court of Justice in the period January 1998 through September 2012, which included 200 General Court judgments and 69 Court of justice judgments<sup>79</sup>. The appeals had been lodged against 75 Commission investigations, some of which related to re-adoptions of annulled decisions. Camesasca *et al* found that "Commission decisions are upheld

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<sup>74</sup> Joined cases 100 to 103/80, *SA Musique Diffusion française and others v Commission* [1983] ECR 1825, paras 106-109 ("the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy").

<sup>75</sup> For instance, Case T-38/02, *Groupe Danone v Commission* [2005] ECR II-4407, para. 455 ; Case T-44/00, *Mannesmannröhren-Werke AG v Commission* [2004] ECR II-2223, para. 301.

<sup>76</sup> Tridimas, P.T. and Gari, G. (2010) "Winners and Losers in Luxembourg: A statistical analysis of judicial review before the European court of Justice and the Court of First Instance (2001-2005)" *European Law Review* 35(2), 131-173, 160.

<sup>77</sup> *Id.*, at 161. The rate of success of actions of annulment against state aids decisions, agriculture, the law governing institutions and commercial policy is significantly lower.

<sup>78</sup> See, however, Geradin, D. and Petit, N. (2010) "Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment", *TILEC Discussion Paper No. 2011-008*, *Tilburg Law School Research Paper No. 01/201*. 1Available at: <http://ssrn.com/abstract=1698342> noting the lack of effective judicial review of the decisions of the Commission in the enforcement of Article 102 TFEU, as opposed to article 101 TFEU and merger control.

<sup>79</sup> Camesasca, P., Ywesyn, J. Weck, T. and Bowman, B. (2013) "Cartel Appeals to the Court of Justice: the Song of the Sirens?", *Journal of European Competition Law & Practice* 4(3), 215.

on appeal, save for rare exceptions”<sup>80</sup>. For instance, out of the 660 pleas directed against fines, only 59 were successful, that is less than 10%. Among those that succeeded most often, Camesasca *et al*/ cited those challenging the proportionality of the infringement duration (23%), those claiming discrimination (17%), or a misapplication of the Leniency Notice (13%). In contrast, pleas challenging the assessment by the Commission of turnover, gravity and mitigating circumstances, “succeeded only where the appellant could show some discriminatory element in the Commission’s fining decision”<sup>81</sup>. The success rate was even lower at the Court of Justice of the EU, as only one plea (concerning the misapplication of the Leniency Notice) was successful out of the 85 put forward all these years<sup>82</sup>. However, the number of successful pleas may not be the best measure for the level of judicial scrutiny. Of the total number of 510 individual appeals in the sample in Camesasca *et al.*, only approximately 200 had been ruled on by the European courts. In 104 cases, the fine was upheld by the GC, and in 69 cases by the Court of Justice. In 31 appeals, the fine was annulled by either the General Court (29) or the CJEU (2). In 69 further cases, the fine was reduced (in 67 cases by the General Court, in two cases by the CJEU). It should be noted, however, that many of the reductions of the fine were only modest.

A similar self-restraint may be observed with regard to the control exercised by the CJEU on the judgments of the General Court. The CJEU recognizes that it should not substitute its own assessment on grounds of fairness for that of the General Court when the latter exercises its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of European Union law<sup>83</sup>. Hence, “only inasmuch as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the General Court erred in law, due to the inappropriateness of the amount of a fine”<sup>84</sup>.

It has been argued that given the broadly “criminal nature” of these infringements the EU Courts should be empowered to exert more stringent control over the lawfulness of antitrust decisions, so as to encompass all matters of law and fact concerning each case, and, therefore, to have the discretion to take a “fresh look” at cases.<sup>85</sup> It

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<sup>80</sup> Camesasca, P., Ywesyn,J. Weck, T. and Bowman,B. (2013) “Cartel Appeals to the Court of Justice: the Song of the Sirens?”, *Journal of European Competition Law & Practice* 4(3), 215, 217.

<sup>81</sup> Camesasca, P., Ywesyn,J. Weck, T. and Bowman,B. (2013) “Cartel Appeals to the Court of Justice: the Song of the Sirens?”, *Journal of European Competition Law & Practice* 4(3), 215, 218.

<sup>82</sup> Camesasca, P., Ywesyn,J. Weck, T. and Bowman,B. (2013) “Cartel Appeals to the Court of Justice: the Song of the Sirens?”, *Journal of European Competition Law & Practice* 4(3), 215, 219.

<sup>83</sup> Case C-89/11 P *E.ON Energie v. Commission* [2012] ECLI:EU:C:2012:738, para. 125.

<sup>84</sup> *Id.*, para. 126.

<sup>85</sup> See Appl. Nos. 7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para. 29; also, inter alia, appl. No 19178/91, *Bryan v United Kingdom*, [1996] 21 EHRR 342, para. 46 of the judgment; see also Commission Opinion, separate concurring Opinion of Mr N. Bratza, p. 354.

is suggested that the European Convention on Human Rights constitutes perhaps the most significant factor in the current pressure for the development of stricter standards of judicial review.

Already in its *Nold* judgment the Court of Justice had recognised that although the Convention was not a part of Community law, it played a key role as a “source of inspiration” in shaping the standards of protection of fundamental rights enshrined in the general principles of EC law.<sup>86</sup> However, the Court emphasised that these standards were autonomous from both the domestic legal traditions of the Member States and the Convention itself, and consequently would have to be “subject to certain limits justified by the overall objectives pursued by the Community”.<sup>87</sup> Consequently, a question emerges as to whether EU law strikes a “fair balance” between the need to secure due process rights and the interest to the effective functioning of the EU institutions, so that the former are not impaired in their essence.<sup>88</sup> The issue is of particular salience now, since the Treaty of Lisbon makes the EU Charter of Fundamental Rights legally binding, and with it the “minimum” level of protection provided by the Convention to rights and freedoms that are common to both instruments.<sup>89</sup> The Treaty also creates the legal basis for the Union to accede to the ECHR, thus paving the way for the former to become subject to the jurisdiction and the oversight of the Strasbourg Court.

According to Article 6 of the European Convention of Human Rights (ECHR), everyone has the right to a “fair hearing before an independent and impartial tribunal established by law” in all proceedings that are decisive for the “determination of civil rights and obligations or of a criminal charge”. Although none of the Convention

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For commentary, see e.g. Andreangelli et al. (2010) “Enforcement by the Commission – the decisional and enforcement structure in antitrust cases and the Commission’s fining system”, in Merola, M. & Waelbroeck, D. (eds.), *Towards an optimal enforcement of competition rules in Europe*, Bruylant, Brussels, Chapter 3.

<sup>86</sup> Case 4/73, *Nold v Commission*, [1974] ECR 491, para. 13.

<sup>87</sup> *Id.*, para. 14.

<sup>88</sup> See appl. No 24833/94, *Matthews v United Kingdom*, [1999] 28 EHRR 361, especially para. 33-34; also appl. No 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1, especially paras. 154-165. For commentary, see e.g. Schermers, H.G. (1999) “*Matthews v United Kingdom*, judgment of 18 February 1999” *Common Market Law Review* 36, 673; Canor, I. (2000) “Primus inter pares. Who is the ultimate guardian of Fundamental Rights in Europe”, *European Law Review* 25, 3; Costello, C. (2006) “The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred boundaries in Europe”, *Human Rights Law Review* 6, 87.

<sup>89</sup> Article 52(3), EU Charter: “Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection.” For commentary, *inter alia*, Lemmens, P. (2001) “The relation between the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights—Substantive aspects”, *Maastricht Journal of European And Comparative Law* 8, 49, 54. Also Arnulf, A. (2003) “From Charter to Constitution and beyond: Fundamental Rights in the new European Union”, *Public Law Winter*, 774, 786.

norms lay down specific “administrative fairness” standards applicable to proceedings before non-judicial authorities, the Court adopted a substantive test to determine whether the exercise of administrative powers by public authorities could be considered as falling within the scope of Article 6(1).<sup>90</sup>

Thus, the Strasbourg Court took the view that the existence of a “criminal charge” should be dependent on substantive factors, namely “the nature and severity of the offence and the penalty,” and “the purpose of the fine”, i.e. whether the latter “was both deterrent and punitive (...).”<sup>91</sup> Similarly, as regards the interpretation of the concept of a “determination of civil rights and obligations”, it was held in the *LeCompte, Van Leuven and DeMeyere* judgment that the French term “‘contestation’ (dispute)... (...) should be given a substantive rather than formal meaning”:<sup>92</sup> Article 6(1) ECHR should therefore be applicable to all proceedings, be they judicial or administrative, whose “result (...) [is] directly decisive”<sup>93</sup> for the existence or the exercise of a substantive right.<sup>94</sup>

This approach was applied to define the nature, for Convention purposes, of competition proceedings in domestic law. In *Stenuit*,<sup>95</sup> the now defunct European Commission on Human Rights stated that, in consideration of the “nature of the offence”, the enforcement of French competition law nevertheless possessed a “criminal aspect...for the purpose of the Convention”.<sup>96</sup> The Human Rights Commission pointed to a “combination of concordant factors”<sup>97</sup> including the goal of the provisions, which was “to maintain free competition within the French market”,<sup>98</sup> their general scope of application,<sup>99</sup> and the deterrent nature of the penalty provided for those responsible, i.e. 5% of their total annual revenue.<sup>100</sup>

The recognition that competition proceedings possess a “criminal character” or a “quasi-criminal” dimension has important implications for the “due process” rules applicable within the EU enforcement framework. An important discussion is currently raging on the compatibility of the structural characteristics of the competition framework in the EU legal system with the Convention of Human Rights, in particular whether an “integrated agency” such as the European Commission, and

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<sup>90</sup> See e.g. Appl. No 7598/76, *Kaplan v United Kingdom*, Commission Decision, [1982] 4 EHRR 64, para. 150. For commentary, inter alia, BOYLE, “Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights”, (1984) *PL* 89 at 90.

<sup>91</sup> Ovey, C. and White, R.C.A (2002) *Jacobs and White European Convention on Human Rights*, 3<sup>rd</sup> Ed.,: Oxford University Press 141.

<sup>92</sup> Series A No 43, *LeCompte, Van Leuven and de Meyere v Belgium*, [1982] 4 EHRR 1, para. 45.

<sup>93</sup> *Id.*, para. 47.

<sup>94</sup> Appl. No 10426/83, *Pudas v Sweden*, [1988] 10 EHRR 380, para. 31.

<sup>95</sup> Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401.

<sup>96</sup> *Id.*, para. 61.

<sup>97</sup> *Id.*, para. 66.

<sup>98</sup> *Id.*, para. 62.

<sup>99</sup> *Id.*, para. 63.

<sup>100</sup> *Id.*, para. 64. See also, *mutatis mutandis*, appl. No 37971/97, *Ste Colas Est and others v France*, judgment of 16 April 2002, para. 46, 48-49.

the judicial stage of the proceedings to which it is subject, fulfils the requirements of “fairness” provided by the Convention.

According to the Strasbourg Court, providing that their decision was open to the scrutiny of a full court of law in respect to all matters of fact and law,<sup>101</sup> administrative bodies could pursue and punish those responsible for “penal” infringements<sup>102</sup>. As a result, it is argued that the existence of the jurisdiction of the General Court to review the Commission’s decisions could make the EU system fully compatible with Article 6 ECHR<sup>103</sup>. Although the CJEU has not taken directly a position as to the compatibility of the EU enforcement regime with Article 6, it has held that the system is compatible with the principle of effective judicial protection laid down in Article 47 EUCFR. According to the CJEU, this principle “implements in European Union law the protection afforded by Article 6(1) of the ECHR”, since the review process before the Courts of the Union “*in fact* involves review of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of fines”<sup>104</sup>. The Court also held that “the unlimited jurisdiction conferred on the General Court in relation to fines by the Treaty and by European Union legislation, which enables it to substitute its own assessment of the fine for that of the Commission, goes beyond what is necessary for the purpose of compliance with the ECHR, since the latter simply requires the Court to be able to establish whether there are errors of fact”<sup>105</sup>.

Furthermore, although fines have increased in aggregate, some recent studies on the European Commission’s cartel fines found that these were considerably less than provided for in the 2006 Guidelines and that the average fine per firm has declined significantly since 2007<sup>106</sup>. It was also argued that the European Court of Human Rights, which developed the “substantive approach” to the determination of the nature—criminal or civil—of penalties, drew a distinction between “criminal offences” that belong to the “hard core of criminal law,” and those infringements which do not meet the same degree of gravity, and therefore lie outside that

<sup>101</sup> Wils, W.P.J. (2010) “The Increased Level of EU Antitrust Fines, Judicial review and the European Convention on Human Rights”, *World Competition* 33(1), 1, 21–22; also, Merola, M. & Waelbroeck, D. (eds.), *Towards an optimal enforcement of competition rules in Europe*, Bruylant, Brussels. (fn. 167). 476–80.

<sup>102</sup> See e.g. appl. Nos.7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para.29; also more recently, appl. No 15809/02 and 25624/02, *O’Halloran and Francis v UK*, judgment of 29 June 2007, available in [2008] 46 EHRR 21, especially para. 56–57

<sup>103</sup> HOUSE of LORDS SELECT COMMITTEE on the EUROPEAN UNION, *XIXth Report*, session 1999–2000, 21/11/2000, para 56. Cf. evidence given by Sir Christopher Bellamy, *ibid.*, para. 56 in respect to decisions not imposing penalties, e.g. decisions imposing commitments. See also, Judgment of the ECtHR, September 27, 2011, *A. Meranini Diagnostics S.R.L. v. Italy*, Application No 43509/08

<sup>104</sup> Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission* [2011] ECR I-13085, paras 51-52 (emphasis added).

<sup>105</sup> *Id.*, para. 43.

<sup>106</sup> See, Veljanovski, C. (2010) “European Cartel Fines Under the 2006 Penalty Guidelines—A Statistical Analysis” *Case Associates*. Available at <http://ssrn.com/abstract=1723843>

“core”<sup>107</sup>. Thus, it was suggested that in cases concerning infringements of the latter kind the safeguards enshrined in Article 6 of the Convention and expressly applicable to “criminal” cases should not apply with the same stringency as in proceedings affecting natural persons accused of “hard core” criminal offences.

Yet concerns have been expressed, even by the members of the CJEU. In a recent, non-binding, yet strongly worded Opinion to the Court, Advocate General (AG) Wathelet called on the General Court to exercise fully its unlimited jurisdiction when reviewing the proportionality of fines. AG Wathelet referred to both Article 47 TFEU and the ECHR noting that the General Court’s assessment should be sufficiently independent from that of the Commission, in that the General Court may neither solely refer to the amount set by the Commission – in a relatively arbitrary fashion, [...] for the basic amount – nor feel bound by the Commission’s calculations or the circumstances that the Commission had taken into account<sup>108</sup>. He lamented the fact that too often the General Court has limited itself to assessing whether the Commission applied its own Fining Guidelines correctly, despite the General Court not itself being bound by those Guidelines<sup>109</sup>. Furthermore, the AG observed that the General Court should not refer anymore to the “large” or “substantial” margin of appreciation of the Commission in the setting of fines, but should make an in-depth legal and factual review of the fine by carrying out, *itself*, the assessment of whether the fine imposed was proportionate, and by checking that all the relevant elements were actually taken into account<sup>110</sup>. It remains to be seen if the CJEU will follow the proposals of the Advocate General.

Interesting as it is, the debate over the compatibility of the European enforcement regime with the high standards of due process included in the European Convention of Human Rights and the Charter of Fundamental Rights of the EU, remains, however, of limited practical utility beyond the EU, and in particular for Chile, although it may offer interesting insights on the difficult compromises that administrative enforcement systems face, in comparison to the prosecutorial system chosen by the Chilean legislator in order to balance effectiveness and the need for an optimal sanctions system, from one side, and justice/proportional sanctions, from the other. The EU has opted for an administrative enforcement system in which increasingly high penalties are imposed following an inquisitorial process within the same administrative institution, the European Commission, which benefits from an

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<sup>107</sup> See e.g. Appl No 73053/01, *Jussila v Finland*, judgment of 23 November 2003, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=JUSSILA&sessionid=70158786&skin=hudoc-en>, see especially para. 35–37 and 43–44. For commentary see e.g. Wils, W.J.P. (2011) “EU antitrust enforcement powers and procedural rights and guarantees: the interplay between EU law, national law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights,” *World Competition* 34(2), 189-213.

<sup>108</sup> Opinion of Advocate General Wathelet, in Case C-295/12 P *Telefónica SA, Telefónica de España SAU v. Commission* [September 26, 2013], para. 109 (Judgment pending).

<sup>109</sup> *Id.*, para. 123.

<sup>110</sup> *Id.*, para. 129.



important “policymaking” and “executing” discretion. Moreover, the judicial scrutiny exercised by the General Court, although unlimited in principle, falls short of that performed in the context of a *de novo* review. The Court of Justice of the EU performs only a limited control of the judgments of the General Court for errors of law. This peculiar enforcement structure contrasts with the adversarial and prosecutorial model of enforcement that was chosen in Chile. Contrary to the European Commission, the FNE cannot impose any penalties but submits its request to an independent specialised tribunal, which has full jurisdiction to set the appropriate level of penalties, following an extensive adversarial process. The Tribunal exercises full scrutiny of the law and facts, as would a normal trial court judging in first instance would have done. The decision may be appealed to the Supreme Court which can scrutinize both errors of law and fact. The relatively low level of fines imposed by the TDLC (also in view of the low legislative threshold), and the primary role the judiciary plays in the enforcement of competition law in Chile, indicate that due process issues are not likely to arise in the foreseeable future<sup>111</sup>.

## 2. The national level

The new legal exception regime adopted by Regulation 1/2003 established a system where the burden of competition law enforcement is shared between the Commission and national competition authorities of EU Member States. National competition authorities act on their own initiative, or following a complaint, and have the power to require that the infringement is brought to an end, to order interim measures, to accept commitments, and to impose fines, periodic penalty payments, or any other penalty provided for in their national law<sup>112</sup>. The Member States are free to determine which body will enforce the EU competition law provisions and the procedure and mechanisms for investigations and for the enforcement of the decisions reached<sup>113</sup>. The Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.<sup>114</sup>

There is a considerable variety of institutional structures across the EU and although the trend is towards some degree of convergence with the EU administrative-centred model, Member States remain free to choose the institutional format for their national

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<sup>111</sup> See Agüero, F. and Montt, S. (2013) “Chile: The Competition Law System and the Country’s Norms” in Fox, E. and Trebilcock, M. (eds.) *The Design of Competition Law Institutions: Global Norms, Local Choices*, Oxford University Press, 149-193; Tapia, J. and Montt, S. (2012) “Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust”, in Lianos, I. and Sokol, D. (eds.) *The Global Limits of Competition Law*, Stanford University press, 141-157.

<sup>112</sup> Article 5, Regulation 1/2003.

<sup>113</sup> Article 35, Regulation 1/2003.

<sup>114</sup> Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43, para. 2.

competition agencies, which could also be judicial organs. One could distinguish between

- (i) purely administrative enforcement model, which constitutes the dominant enforcement system in Europe. This system involves either a single independent administrative authority that conducts both the investigation and the adjudicatory function<sup>115</sup>, or an administrative enforcement system with a dual structure, where the investigation and adjudicatory functions are more or less separated from each other and exercised by different bodies within the same NCA. Most often this involves the adjudicatory function of a college of commissioners.<sup>116</sup> The decisions can also be subject to some form of judicial control.
- (ii) mixed enforcement system model, where the investigation and adjudicatory functions are shared between the administration (a competition authority or a government department), which conducts the investigation, and a judicial organ (of an administrative<sup>117</sup>, civil<sup>118</sup> or criminal<sup>119</sup> nature), which exercises the adjudicative function.

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<sup>115</sup> This is the institutional enforcement system chosen by Bulgaria, Cyprus, Germany, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Czech Republic, Romania, United Kingdom, Slovakia, Slovenia.

<sup>116</sup> This is the institutional enforcement system chosen by France, Luxembourg, Spain. One could also add to some degree Greece, Hungary, Romania and Italy where the final decision is taken by a college of commissioners, after the conduct of the investigation by the directions of the competition authority, but, contrary to France, Luxembourg and Spain, there is no complete separation between the two organs, as there is some form of hierarchical relationship between the college and the investigations teams of the authority.

<sup>117</sup> This is the institutional enforcement system chosen by Belgium (the investigation is conducted by the ministry of Economics, but the final decision is taken by the college of the Conseil de la concurrence which has the statute of an administrative judicial body) and Finland (where the Ministry of Economics conducts the investigation and the final decision is taken by the Kilpailuvirasto or Market tribunal – an administrative judicial organ).

<sup>118</sup> This is the institutional model chosen by Austria (where the federal ministry of economics conducts the investigation phase, the Federal cartel Attorney, “*Bundeskartellanwalt*”, is entrusted with the representation of the public interests in competition matters and brings proceedings to the Kartellgericht or Cartel court, which exercises the adjudicatory function) and Sweden (the investigation being at the hands of the Konkurrenvertsket and the adjudicatory function being exercised by the Tribunal of Stockholm).

<sup>119</sup> This is the institutional model chosen by Denmark (where the Konkurrencestyrelse or Ministry of economics is the investigating body but the final decision is taken by a criminal judge), Estonia (where the investigation is conducted by the Estonian Institute of competition, which is part of the Ministry of Economics, the final decision being taken by a criminal judge) and Ireland (where the investigation is conducted by the Irish Competition Authority, the final decision being taken by either the High Court – for civil court cases – or for hardcore restrictions by the Central Criminal Court, after the case has been presented to the Director of public prosecutions. The same system is also chosen by the UK, when enforcing the cartel offence under the Enterprise Act 2002 with the OFT investigating, the Serious Fraud Office acting as the prosecutor and the magistrates’ court (summary trial) or the Crown Court (trial on indictment) adjudicating.

The decisions of the competition authorities are subject to judicial control<sup>120</sup>, either before courts, which can be a generalist court with exclusive competence to hear all competition appeals,<sup>121</sup> or before a specialised tribunal in competition or economic litigation<sup>122</sup>. The judicial control might take different forms: it might be a limited judicial review of the legality of the decision,<sup>123</sup> or involve a full jurisdictional (appeal) process<sup>124</sup>. An additional layer of judicial control of the review or appeal decisions may occur at a higher level of jurisdiction, which in some cases comprises a specialised chamber in competition litigation<sup>125</sup>. We will explore the judicial scrutiny exercised on the setting of penalties in some key EU jurisdictions.

### a. United Kingdom

The remedies and penalties imposed by the Office of Fair Trading (OFT), recently replaced by the Competition and Markets Authority (CMA), with regard to the application of Articles 101, 102 and their national equivalents (Chapter I and II of the Competition Act 1998), are all subject to a full merits (appellate) review in front of a specialised Tribunal, the Competition Appeal Tribunal (CAT)<sup>126</sup>. The process is close

<sup>120</sup> For a useful summary see, Roseau, M. (2007) "Panorama des procédures d'appel contre les décisions des ANC en Europe", *Concurrences* 2, 209-218.

<sup>121</sup> See, for instance in Belgium (the Court of Appeal of Brussels for the decisions of the *Conseil de la concurrence* and the Council of State for Ministerial decisions in case of mergers), Bulgaria (the Supreme administrative court), Cyprus (the Supreme court), Czech Republic (Regional Court of Brno), France (the Court of Appeal of Paris), Estonia (The Administrative Court of Talin), Germany (the judicial control of federal competition decisions takes place at the Higher Regional Court of Düsseldorf), Greece (the Administrative Appeal court of Athens), Latvia (the Administrative court of Riga), Hungary (the Metropolitan Tribunal of Budapest), Italy (the Regional Administrative Court of Lazio), Ireland (the High Court), Lithuania (the Administrative Court of Vilnius), Luxembourg (the Administrative Tribunal of Luxembourg), the Netherlands (the Court of Rotterdam), Portugal (the Commercial Court of Lisbon), Romania (the Court of appeal of Bucharest), Slovenia (the Administrative Court but only in specific circumstances as the decision of the NCA is final), Slovakia (the Regional Court of Appeal of Bratislava).

<sup>122</sup> See, for instance, Austria (Antitrust Court of Appeal), Denmark (Competition Court of appeal), Finland (Market Court), Spain (Defence of Competition Tribunal for the decisions of the Service for the protection of competition and the *Audiencanacional* for the decisions of the Defence of Competition Tribunal), Sweden (the Market Court for the decisions of the konkurrensverket and the Court of Stockholm for the decisions of the Market Court), Poland (Competition and Consumer Protection Court), UK (the Competition Appeal Tribunal).

<sup>123</sup> See, for instance, Austria, Estonia, Latvia, Lithuania, Slovakia,

<sup>124</sup> See, for instance, Belgium (with the exception of the ministerial decisions for mergers where the Council of State exercises a control of legality), Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Italy, Netherlands, Slovenia Sweden, , UK (with the exception of merger decisions for which it is a judicial review), Portugal.

<sup>125</sup> See, for instance, in Germany (where the Federal Court of Justice comprises a specialised chamber in antitrust litigation) or in the Netherlands (the Dutch Trade and Industry Appeals Tribunal).

<sup>126</sup> The Tribunal was established by the Enterprise Act 2002 (Section 12 and Schedule 2). The CAT does not have inherent jurisdiction as the High Court (whose jurisdiction is established by precedent) but a statutory jurisdiction, its standards of review being based on statutory law. Section 46(1) and (2) of the Competition Act 1998 provide that any party to an agreement in respect of which the OFT has made a decision, or any person in respect of whose conduct the OFT has made a decision, may appeal to the CAT 'against, or with respect to, the

to a quasi-adversarial model, where the decisions of the OFT, or now the CMA, are subject to strict and intensive scrutiny in law, facts, and policy, the CAT having the authority to substitute its assessment to that of the CMA. The intensity of judicial control exercised over remedies and penalties is particularly strong, in comparison to the situation in the EU generally.

In a full merits (appeal) review, the CAT proceeds to extensive findings of fact in cases where the evidence relied on by the CMA is challenged, very often on the basis of extensive new material introduced by the appellant, and rebuttal evidence introduced by the CMA<sup>127</sup>. However, the Tribunal exercises an appellate function and cannot proceed to the same analysis of the factual record as a court (or a regulator) would do in the first instance. The fact that it is an (appellate) review (and not a review *de novo*), limits to an extent the factual record submitted by the parties, and thus examined by the authority<sup>128</sup>. Hence, some weight will still be provided to the analysis performed by the relevant competition authority in the first instance<sup>129</sup>. As some commentators have explained, 'when the decision under challenge is a multi-faceted policy decision, the CAT is more likely to allow the legitimate judgment of the regulator to stand, unless it can be shown that there is some error in the basis for that judgment'<sup>130</sup>. In contrast to judicial review or to the ordinary approach of an appellate court, the CAT is, however, willing in an appeal to determine disputes of primary fact, and proceeds more frequently than other appellate courts to cross-examination of witnesses<sup>131</sup>. This might seem, at first sight, to blur the distinction between an appeal process and an examination of the facts of the case at first instance. The appellate process certainly involves the rehearing of a case, but the content of such a rehearing is something that depends on a variety of factors. Writing in the context of an appeals process to the decision of a court at first instance, Mary L.J., noted that:

The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision-making process.

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*decision*'. Such decisions may also be made by the various sectoral regulators pursuant to the competition jurisdictions they hold concurrently with the OFT. Schedule 8 provides for two different types of review depending on the type of decision under appeal. In most cases, according to paragraph 3(1) of the Schedule, the CAT 'must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal'.

<sup>127</sup> *M.E. Burgess, J.J. Burgess & S.J. Burgess v. OFT*, [2005] CAT 25, para. 130.

<sup>128</sup> See, *Freeserve v Director General of Telecommunications* [2003] CAT 5, paras 110-111 '[...] in our view this Tribunal is essentially an appellate tribunal, not a tribunal of first instance. In complainants' appeals (as distinct, for example, from appeals against penalties) it seems to us that the primary task of the Tribunal will usually be to decide whether, on the material put before him by the complainant, the Director was correct in arriving at the conclusion that he did. If it turns out, in the course of the appeal, that the Director was insufficiently informed, in our view the appropriate course will usually be for the Tribunal to remit, rather than to attempt to investigate the merits for the first time'.

<sup>129</sup> *Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31, paras 70 & 72.

<sup>130</sup> Dinah Rose QC & Tom Richards, *Appeal and Review in the Competition Appeal Tribunal and High Court*, Blackstone Chambers, op. cit. p. 19.

<sup>131</sup> *Ibid.*

There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence [,] where credibility is in issue [compared to] purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material.<sup>132</sup>

Hence, re-hearing in an appeal does not amount to a rehearing ‘in the fullest sense of the word’, as the Court should ‘not normally interfere with the exercise of a discretion unless the decision of the lower [authority] was reached on wrong principles or was otherwise plainly wrong’.<sup>133</sup> Hence, ‘in so far as rehearing [...] may have something of a range of meaning at the lesser end of the range it merges with that of [judicial] ‘review’, as, ‘at this margin, attributing one label or the other is a semantic exercise which does not answer such questions of substance as arise in any appeal’.<sup>134</sup> As the CAT has clearly explained in *M.E. Burgess*, ‘(i)n deciding whether to take its own decision, the Tribunal is mindful of the fact that it is an appellate tribunal [reviewing] an administrative decision and should not therefore turn itself into the primary decision-maker without good reason’<sup>135</sup>. There is a perceptible tension between this principle and the fact that ‘the Tribunal’s jurisdiction is a merits jurisdiction, and thus wider than a judicial review jurisdiction’<sup>136</sup>.

It follows that some margin of appreciation may also persist in the context of an appellate review process, depending on the exact position of the specific category of the decision in the ‘spectrum of appropriate respect,’ from which decision-makers benefit in the first instance. ‘Multi-factorial’ decisions or decisions ‘dependent on inferences and an analysis of documentary material’ (thus involving a wide margin of interpretative choices and important sources of information or methodological and epistemic competence), require in general more respect for the choices made by the competition authority than its decisions over primary facts.

The CAT has examined the penalties imposed by the CMA on a number of occasions<sup>137</sup>. The CAT may impose, revoke, or vary the amount of the fines

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<sup>132</sup> *Dupont de Nemours v Dupont* [2003] EWCA Civ 1368, para. 94 cited by Dinah Rose QC & Tom Richards, Appeal and Review in the Competition Appeal Tribunal and High Court, Blackstone Chambers, op.cit. p.20.

<sup>133</sup> Ibid., paras 96-97.

<sup>134</sup> Ibid., para. 98.

<sup>135</sup> *M.E. Burgess, J.J. Burgess & S.J. Burgess v. OFT*, [2005] CAT 25, para. 129.

<sup>136</sup> *Floe Telecomm v Office of Communications* [2005] CAT 14, para. 65, “It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the [competition authority]’.

<sup>137</sup> See appendix 1, Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova E., David, E. et al (2014) An Optimal and Just Financial Penalties System for Infringements of Competition Law: a Comparative Analysis (CLES Research paper series 3/2014, UCL Faculty of Laws: London).

imposed. The Tribunal is not bound by the OFT/CMA Guidance on penalties<sup>138</sup>. However, it will not disregard either the Guidance or the CMA's approach and reasoning in the specific case<sup>139</sup>. The Tribunal also takes into account the objectives pursued by the CMA's policy on fines, as explained in the *Guidance on penalties* when examining their reasonableness or proportionality<sup>140</sup>, while affording the OFT (or the CMA) some margin of appreciation<sup>141</sup>. The latter concept is interpreted differently than in the context of the "typical" judicial review, where it would "imply the presence of some restriction on the intensity of that review"<sup>142</sup>. The Tribunal has indeed held that its assessment "should focus primarily on whether the overall penalty imposed is appropriate for the infringements in question." "[P]rovided that the OFT has remained within its margin of appreciation in applying the Guidance, the Tribunal's primary task [will be] to assess the justice of the overall penalty, rather than to consider in minute detail the individual Steps applied by the OFT, particularly as regards Step 1 and Step 3"<sup>143</sup>. Reference to the "margin of appreciation" does not, according to the CAT, "in any way impede or diminish the Tribunal's undoubted jurisdiction to reach its own independent view as to what is a just penalty in the light of all the relevant factors"<sup>144</sup>. The CAT will sanction any significant departure from the Guidance, although it also recognized that there is limited precedential value in decisions relating to penalties, "where the maxim that each case stands on its own facts is particularly pertinent"<sup>145</sup>. The "policymaking discretion" recognized by the OFT and the CMA in the interpretation and implementation of the Guidance may be illustrated by the following excerpt from *Kier Group v. OFT*:

"The Guidance reflects the OFT's chosen methodology for exercising its power to penalise infringements. It is expressed in relatively wide and non-specific language, which is open to interpretation, and which is clearly designed to leave the OFT sufficient flexibility to apply its provisions in many different situations. Provided the penalty ultimately arrived at is, in the Tribunal's view, appropriate it will rarely serve much purpose to examine minutely the way in which the OFT interpreted and applied the Guidance at each specific step. As the Tribunal said in *Argos* (above), the Guidance allows scope for adjusting at later stages a penalty which viewed in isolation at an earlier, provisional, stage might appear too high or too low.

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<sup>138</sup> *Kier Group PLC & others v. OFT* [2011] CAT 3, paras 74 & 77; *Argos Limited and Littlewoods Limited and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, para. 160.

<sup>139</sup> *Kier Group PLC & others v. OFT* [2011] CAT 3, para. 74.

<sup>140</sup> See the analysis performed in *Eden Brown Limited v. OFT* [2011] CAT 8, paras. 81-102 (e.g. para. 90). The policy objectives pursued by the OFT are listed in Section 1.4. of the OFT 423, *Guidance as to the appropriate amount of a penalty* (September 2012).

<sup>141</sup> *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1, para. 500; *Argos Limited and Littlewoods Limited and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318 ; *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, para. 27.

<sup>142</sup> *Kier Group PLC & others v. OFT* [2011] CAT 3, para. 75.

<sup>143</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, para. 172.

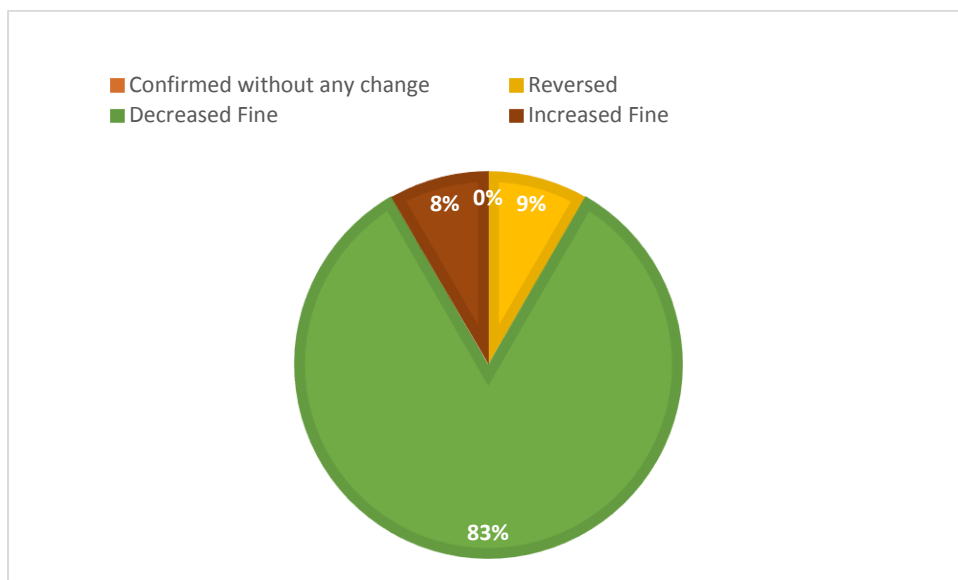
<sup>144</sup> *Kier Group PLC & others v. OFT* [2011] CAT 3, para. 76.

<sup>145</sup> *Kier Group PLC & others v. OFT* [2011] CAT 3, para. 116.

On the other hand if [...] the ultimate penalty appears to be excessive it will be important for the Tribunal to investigate and identify at which stage of the OFT's process error has crept in. Assuming the Guidance itself is unimpugned [...] the imposition of an excessive or unjust penalty is likely to reflect some misapplication or misinterpretation of the Guidance"<sup>146</sup>.

In most instances, the CAT will first consider the implementation of the Guidance by the OFT/CMA, before proceeding to its own assessment of the level of the penalty on the basis of a "broad brush" approach taking the case as a whole, and refusing to adopt a "mechanistic approach"<sup>147</sup>. According to the Tribunal, the "determination of the penalty requires a refined consideration and assessment of all the relevant circumstances, and the element of deterrence, while undoubtedly one of those circumstances, should not lead to the level of penalty being calculated according to a mathematical formula"<sup>148</sup>.

Notwithstanding the consideration of the OFT Guidelines, the CAT seems to exercise a quite intensive review of the financial penalties imposed by the OFT/CMA (or sector-specific regulators concurrently implementing EU and UK competition law), Out of the 12 appeals against infringement decisions of the OFT since April 2001 and until the end of December 2013, the CAT has reversed the decision of the OFT setting fines once, while it increased the fine in one occasion and decreased the fine in 10 appeals against the decisions imposing financial penalties.



**Figure 2: Appeals at the Competition Appeal Tribunal against financial penalties**

<sup>146</sup> *Kier Group PLC & others v. OFT* [2011] CAT 3, paras 76-77.

<sup>147</sup> See, for instance the assessment of the penalties in *Eden Brown Limited v. OFT* [2011] CAT 8, paras. 81-102.

<sup>148</sup> *Eden Brown Limited v. OFT* [2011] CAT 8, para. 99 (also para. 100).

Although the UK competition law enforcement system and, in particular, the judicial scrutiny phase has entered into an era of reform, the recent proposals by the Government on *Streamlining Regulatory and Competition Appeals* do not suggest any modification of the type and intensity of judicial scrutiny of penalties for infringement of competition law, although they suggest a move to a less intrusive judicial control for other types of decisions<sup>149</sup>.

## **b. Germany<sup>150</sup>**

In the fines procedure, the competition authority issues a fines decision ('*Bußgeldbescheid*'), which states, in particular, the nature of the offence, time and place of the alleged infringement, the legal elements of the offence, the available evidence, the fine and other sanctions, and an explanation of the possibility for a court decision by raising an 'objection' ('*Einspruch*').<sup>151</sup>

In our context, it is important to note from the outset that an objection to the fines decision ('*Einspruch*') does not merely lead to a judicial 'review' of the administrative fines decision. Instead, once the person concerned objects to the decision, the decision loses its independent, constitutive character, and from then on it has the status of a mere indictment without any prejudicial value. The Court conducts a full *de novo* trial. As the Court follows the quasi-criminal procedure, extensive evidence will be taken.<sup>152</sup>

Nor is the court confined by the authority's decision with respect to the amount of the fine.<sup>153</sup> Objecting to a fines decision may therefore eventually result in a higher fine than the one that had been imposed by the competition authority (so-called *reformatio in peius*, a possibility to which the person concerned has to be alerted in the fines decision, § 66(2) no. 1(b) OWiG). While this may not have been a serious consideration in earlier times when the fines level was low,<sup>154</sup> the Oberlandesgericht Düsseldorf has recently demonstrated that *reformatio in peius* can lead to a substantial increase; it increased the fines which the Bundeskartellamt had imposed

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<sup>149</sup> HM Government, (2013) "Streamlining Regulatory and Competition Appeals. Consultation on Options for Reform" (19 June 2013).

<sup>150</sup> The following draws heavily on Wagner-von Papp, F. (2013) "Germany" in Denozza, F. and Toffoletto, A. (eds), *International Encyclopedia of Laws: Competition Law*, Alphen aan den Rijn, NL: Kluwer Law International, paras 552-558.

<sup>151</sup> § 66 of the Act on Administrative Offences (*Ordnungswidrigkeitengesetz*, OWiG).

<sup>152</sup> See text accompanying note 158 below.

<sup>153</sup> In contrast, for example, to the Austrian system, where the court may not impose a higher fine than the competition authority proposes.

<sup>154</sup> See, for example, KG, 29 Apr. 1975, Kart. 38/74, WuW/E OLG 1627, 1632 – *Mülltonnen*, where the fine imposed by the *Bundeskartellamt* for a bid-rigging agreement was increased by 50% to ensure a deterrent sanction; the resulting fine of DM 15,000 still appears negligible by today's standards.



on the members of the *Liquid Gas Cartel* from approximately €180 million to €244 million.<sup>155</sup>

The objection against a fine decision by a competition authority is addressed to – and will in the first instance be reviewed by – this competition authority. The competition authority may reject the objection if it is inadmissible for procedural reasons (§ 69(1) OWiG). If it is admissible, the authority may take additional evidence and/or reconsider its decision (§ 69(2) OWiG). If the authority stands by its fines decision, it decides on whether to grant access to the file (§ 49 OWiG, § 147 StPO). The authority then transfers the files to the public prosecutor's office, which at that instance becomes competent to initiate a public prosecution (§ 69(3), (4) OWiG).

The public prosecutor has three options: it may take additional evidence, close the proceedings, or transfer the files to the court. In competition cases jurisdiction lies with the Higher Regional Court (OLG) in the district in which the competition authority has its seat (§ 83 GWB); where it was the *Bundeskartellamt* that imposed the fine, the OLG Düsseldorf has jurisdiction. Where the court considers the investigations 'obviously insufficient', it may send the files back. Otherwise, it decides on the procedural admissibility of the objection. Where the objection is admissible, the court may order the taking of further evidence. Under the statutory provisions (§ 72 OWiG), the court – with the approval of the prosecutor and the person(s) concerned – could theoretically decide on the merits of the case without a trial, based solely on written submissions. However, in complex competition cases, this will not usually be an option, and a trial will ensue.

The prosecution during the trial lies in the hands of the public prosecutor. The competition authority has only a supportive role.<sup>156</sup> The court has to inform the competition authority of the trial date and provides the competition authority with the opportunity to state aspects of the case that are in its view relevant (§ 76(1) OWiG), and the court 'may' give the authority's representative the opportunity to ask questions from the persons concerned, including calling witnesses and expert witnesses (§ 82a(1) GWB). For actions for which the court requires the prosecution's approval, the court needs to consult the competition authority; however, where the public prosecutor approves while the competition authority objects, it is the public prosecutor that prevails.

While the procedural rules for trials in administrative fines matters largely follow the rules for criminal trials, there are a number of accommodations of the strict standards applied in criminal trials. It should be noted that this is mostly because administrative

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<sup>155</sup> OLG Düsseldorf, 15 Apr. 2013, VI-4 Kart 2-6/10 OWi – *Liquid Gas Cartel*: increase from EUR 180 million to EUR 244 million (available at [www.nrwe.de](http://www.nrwe.de); also cf. the press release in English issued by the *Bundeskartellamt*, at [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/16\\_04\\_2013\\_Flüssiggaskartell-OLG.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/16_04_2013_Flüssiggaskartell-OLG.html)) (appeal pending before the Bundesgerichtshof).

<sup>156</sup> This has been repeatedly criticized, and the 7th Amendment to the GWB was meant to hand the prosecution to the competition authority, before the plans were thwarted by the German Justice Department.

offences usually deal with minor matters and concern low fines, such as minor traffic infractions. Compared to the nature and gravity of other administrative offences, it is an abnormality that competition law infringements, with its huge fines, are classified as administrative and not criminal offences. Nevertheless, the courts do apply the relaxed rules of procedure even to complex cases where fines in the amount of several million of euros are concerned. One of the most important relaxations of the stringency of criminal trials is § 77 OWiG, which allows the court substantial flexibility with regard to the extent to which it allows evidence to be introduced in trials on administrative offences. In particular, the court may reject applications for taking evidence where it is persuaded that the evidence before the court has already revealed the truth. While such shortcuts are arguably an efficient way of disposing of minor run-of-the-mill administrative offence cases (such as traffic offences), the courts' discretion when deciding on multi-million euro fines on undertakings, or hundreds of thousands of euro fines on individuals, is problematic.<sup>157</sup> The courts relatively frequent use of § 77 OWiG in competition cases is particularly problematic in view of the statutory admonition that the courts should take account of the 'importance of the matter before it' when exercising its discretion concerning the extent of the introduction of evidence (§ 77(1)2 OWiG).

Despite these relaxations, the quasi-criminal procedure guarantees a full and cumbersome taking of evidence. Konrad Ost, the Bundeskartellamt's Director for General Policy, has recently noted that a medium-sized cartel, such as the Paper Wholesalers cartel, took 20 days in court; the Cement Cartel 37 days in court; and the Liquid Gas Cartel 100 days in court over a total duration of three years.<sup>158</sup>

### **c. France**

Decisions of the FCA can be challenged before the Paris Court of appeal (hereafter, the "Court")<sup>159</sup>. According to Article L. 464-8 of the French Commercial Code, the Court exercises full control on the law and the facts. When the Court annuls a decision of the FCA, the Court may issue a full judgment imposing a fine, rather than the case coming back before the FCA in order for it to adopt a new decision<sup>160</sup>.

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<sup>157</sup> See generally Dannecker, G. and Biermann, J. (2007) in Immenga, U. and Mestmäcker, E.-J. (eds) *GWB Kommentar*, 4th edn., Munich: C.H. Beck. Vorbemerkung vor § 81 para. 192.

<sup>158</sup> Ost, K. (2014) "From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence", *Journal of European Competition Law & Practice* 5(3), 125, 129.

<sup>159</sup> Decisions of the Court can be challenged before the Supreme Court (Cour de cassation).

<sup>160</sup> Supreme Court, 13<sup>th</sup> July, 2004 (challenging Paris Court of appeal, 14<sup>th</sup> January, 2003).

Decisions of the Court have no *erga omnes* effect. Therefore, the sanctioned undertakings which did not challenge the decision of the FCA do not benefit from any eventual annulment of this decision in favor of other undertakings<sup>161</sup>.

The Court can reduce, confirm or increase<sup>162</sup> the fines imposed by the FCA. The Court can also impose fines to a non-fined undertaking should the procedure before the Court provide sufficient evidence for doing so<sup>163</sup>. Nevertheless, the scope of the decision of the FCA may put a limit on the scope of the judicial scrutiny exercised by the Court. Therefore, for instance, when a decision rejecting a complaint is challenged, the Court cannot impose a fine on the undertaking, but the FCA still must take the case<sup>164</sup>. Except a few decisions<sup>165</sup>, it is well established that the Court cannot decide *ultra petita*. Therefore, the Court cannot increase a fine without a prior and reasoned request (generally from the Minister of the Economy)<sup>166</sup>.

In contrast with the EU jurisprudence<sup>167</sup>, the Court controls if a fine was justified in principle<sup>168</sup>. The Court makes its own assessment of the proportionality of the fines imposed by the FCA. The most frequent reason to reduce the fines has been the financial and economic difficulties faced by the fined entity. In a very famous case (the *Steel cartel* case), the Paris Court of appeal has substantially reduced the fines imposed by the FCA (the total amount of the fines was €575 million; the amount of the reduction has been up to 90% for some undertakings)<sup>169</sup>. This judgment has been influential in the decision of the FCA to adopt its sentencing guidelines (hereafter, "SG") in May 2011.

To the time of writing, the Court has ruled four times on decisions where the SG was applied by the FCA and each time has confirmed the decisions of the FCA.

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<sup>161</sup> Paris Court of appeal, 13th December 1995 (challenging Decision N°94-D-60 of 13th December, 1994).

<sup>162</sup> See Paris Court of appeal, 19th May 1988 (challenging Decision N°87-D-54) and 2<sup>nd</sup> April 1996 (challenging Decision N°95-D-23 of 14<sup>th</sup> March, 1995 and confirmed by the Supreme Court, 24<sup>th</sup> March, 1998).

<sup>163</sup> See, for instance, Paris Court of appeal, 14th November 2000 (challenging Decision N°2000-D-24 of 10<sup>th</sup> May, 2000).

<sup>164</sup> Paris Court of appeal, 14<sup>th</sup> November 2000 (challenging Decision N°2000-D-24 of 10th May 2000).

<sup>165</sup> Paris Court of appeal, 28<sup>th</sup> May 1996 (challenging Decision N°95-D-56 of 12<sup>th</sup> September 1995).

<sup>166</sup> Paris Court of appeal, 21<sup>st</sup> January, 1993 (challenging Decision N°92-D-33 of 6<sup>th</sup> May 1992) ; 25<sup>th</sup> February, 1994 (challenging Decision N°93-D-14 of 18 May 1993) ; 2<sup>nd</sup> April 1996 (challenging Decision N°95-D-23 of 14<sup>th</sup> March 1995) ; 13<sup>th</sup> December, 2001 (challenging Decision N°2000-D-39 of 24<sup>th</sup> January 2001).

<sup>167</sup> See General Court, Case T-62/98, 6<sup>th</sup> July, 2000, *Volkswagen AG v. Commission CE*, esp. §335.

<sup>168</sup> Paris Court of appeal, 20<sup>th</sup> April 1989 (challenging Decision N°88-D-39) ; 10<sup>th</sup> December 1992 (challenging Decision N°92-D-20 of 17<sup>th</sup> March, 1992).

<sup>169</sup> Paris Court of appeal, 19<sup>th</sup> January, 2010, (challenging decision N°08-D-32 of 16<sup>th</sup> December, 2008).

According to the Court<sup>170</sup>, the SG complies with the legal framework (Article L. 442-6 of the French Commercial Code). The Court has ruled that, thanks to the SG, the FCA has described and explained its method of setting the amount of the fines imposed on entities. The Court has ruled that the SG has no normative value, since it must be considered as a guidance statement (administrative directive)<sup>171</sup>. The Court controls if the FCA has correctly applied the criteria set out in Article L. 442-6 of the French Commercial Code (seriousness of the practices, damages caused to the Economy, personal situation of each fined entity and reiteration).

Since the decisions rendered by the FCA are more reasoned, the ability for the Court to have its own assessment of the facts is limited. Therefore, the Court controls if the FCA has failed or erred in its assessment of the elements contained in the file. The Court has ruled that an appellant cannot refer to prior decisions or jurisprudence in order to argue a violation of the principle of equality of treatment, since this assessment must be done on a case by case basis<sup>172</sup>. What may appear more contestable is that the Court has also ruled that an undertaking cannot invoke as well the treatment of another party to the same procedure under the same reasoning<sup>173</sup>.

We can suppose that the Court should increase its control on the assessment of the facts by the FCA. Nevertheless, because of the SG, the decisions rendered by the FCA are more reasoned (this is a confirmed tendency since the middle of the 2000's). Therefore, the Court is more reluctant to revise the reasoning of the FCA and the amount of the fines.

### 3. United States

We will focus here on the judicial scrutiny exercised by an appellate court to a sentencing judge, in view of the prosecutorial nature of the US enforcement system. The degree of deference an appellate court owes to a sentencing judge is still unclear in US law. Normally, as the Supreme Court explained in *Booker* the “statutory language, the structure of the Sentencing Reform Act, and the sound administration of justice, taken together, require appellate courts to apply “reasonableness standard(s) of review”<sup>174</sup>. In *Kimbrough*<sup>175</sup>, *Spears*<sup>176</sup> and *Pepper*<sup>177</sup>, the Supreme Court held however that a sentencing judge’s sentencing determination may be subject to a more intensive judicial scrutiny, close to that of the

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<sup>170</sup> Paris Court of appeal, 30<sup>th</sup> January, 2014 (challenging decision N°11-D-17 of 8<sup>th</sup> December, 2011) and 10<sup>th</sup> October, 2013, (challenging decision N°12-D-10 of 20<sup>th</sup> March, 2012).

<sup>171</sup> Paris Court of appeal, 30<sup>th</sup> January, 2014 (challenging decision N°11-D-17 of 8<sup>th</sup> December, 2011).

<sup>172</sup> Paris Court of appeal, 10<sup>th</sup> October, 2013, (challenging decision N°12-D-10 of 20<sup>th</sup> March, 2012).

<sup>173</sup> Paris Court of appeal, 10<sup>th</sup> October, 2013, (challenging decision N°12-D-10 of 20<sup>th</sup> March, 2012).

<sup>174</sup> *United States v. Booker*, 543 U.S. 220, 260-261 (2005).

<sup>175</sup> *Kimbrough v. United States*, 552 U.S. 85, (2007).

<sup>176</sup> *Spears v. United States*, 555 U.S. 261 (2009).

<sup>177</sup> *Pepper v. United States*, 131 S. Ct. 1229, (2011).

Administrative Procedure Act (APA) (the “arbitrary and capricious review”) if the sentencing judge imposes a sentence that varies from the Guidelines on the basis of a policy disagreement<sup>178</sup>. In view of the institutional characteristics of the Sentencing Commission, which has capabilities to collect and analyze empirical data and national experience, the Supreme Court felt that although the Sentencing Guidelines are advisory, in “light of the “discrete institutional strengths” of the Sentencing Commission and sentencing judges”, they should be offered some degree of respect<sup>179</sup>. According to Justice Breyer (concurring opinion) in *Pepper*:

“(t)he trial court typically better understands the individual circumstances of particular cases before it, while the Commission has comparatively greater ability to gather information, to consider a broader national picture, to compare sentences attaching to different offenses, and ultimately to write more coherent overall standards that reflect nationally uniform, not simply local, sentencing policies”<sup>180</sup>.

Hence, a “sliding scale” framework of review requires appellate courts to subject sentencing judges’ decisions to a more intensive review, when they rest upon a disagreement with the policy followed by the Guidelines; Judges are also offered “greater deference” when their determination is based on “case-specific factors”<sup>181</sup>. Indeed, appellate courts should review those decisions with greater deference when they rest upon case-specific circumstances that place the case outside a specific Guideline’s ‘heartland’<sup>182</sup>.

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<sup>178</sup> Cases discussed by Thide, F. (2013) “Judicial Policy Nullification of the antitrust Sentencing Guideline”, *Boston College Law Review* 54(2), 861, 878-879, 901.

<sup>179</sup> Thide, F. (2013) “Judicial Policy Nullification of the antitrust Sentencing Guideline”, *Boston College Law Review* 54(2), 861, 879.

<sup>180</sup> *Pepper v. United States*, 131 S. Ct. 1229, 1253-1254 (2011) (Breyer J., concurring).

<sup>181</sup> Thide, F. (2013) “Judicial Policy Nullification of the antitrust Sentencing Guideline”, *Boston College Law Review* 54(2), 861, 879.

<sup>182</sup> See also, *Rita v. United States*, 551 U. S. 338, 351 (2007).